No. 22-1151

IN THE

United States Court of Appeals for the First Circuit

ANDERSON ALPHONSE,
Petitioner-Appellant,

v.

ANTONE MONIZ, Superintendent, Plymouth County Correctional Facility,

Respondents-Appellee

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

BRIEF OF FORMER IMMIGRATION JUDGES AND FORMER MEMBERS OF THE BOARD OF IMMIGRATION APPEALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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FRAP RULE 29 STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), undersigned counsel for *amici curiae* state that all parties have consented to the filing of this brief.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), undersigned counsel for *amici curiae* states that no counsel for the parties authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *amici* and their counsel contributed money that was intended to fund the preparing or submitting of this brief.

By: /s/ *Evan M. Piercey*
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A), undersigned counsel hereby certify that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

Dated: July 5, 2022

By: /s/ *Evan M. Piercey*
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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 38 former immigration judges ("IJs") and members of the Board of Immigration Appeals ("BIA").[2]

Amici have dedicated their careers to improving the fairness and efficiency of the United States immigration system, and have an interest in this case based on their combined centuries of experience administering the immigration laws of the United States. *Amici* collectively have presided over thousands of removal proceedings and thousands of bond hearings in connection with those proceedings, and have adjudicated numerous appeals to the BIA.

In denying Anderson Alphonse's ("Mr. Alphonse" or "Petitioner") petition for writ of habeas corpus, the United States District Court for the District of Massachusetts (Saylor, J.), relied in part on the premise that it was "readily foreseeable that proceedings will conclude in the near future" because Mr. Alphonse's appeal to the BIA was "fully briefed." This premise—at best aspirational when made in January 2022—has proven erroneous: nearly six months later, Mr. Alphonse's BIA appeal remains undecided. This is, regrettably, unsurprising given the surging caseload in the immigration courts, which now exceeds 1.8 million

[1] *Amici* state that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *Amici* or their counsel made a monetary contribution to fund the preparation or submission of this brief.
[2] *See* the appendix for a complete list of signatories.

pending cases. This crushing backlog—adding significantly to the backlog facing the BIA—is extremely relevant to the question of when a removal proceeding is likely to conclude. In fact, it might be the most important factor in this equation. Yet this factor is absent from the First Circuit's current analytical framework, opening the door to erroneous suppositions and conclusions based on a cursory review of a removal proceeding's posture, such as the one made by the District Court here.

Thus, *Amici* write to respectfully urge the Court to reassess the impact the backlog of cases facing the immigration courts may have on the ability of courts to accurately forecast when removal proceedings will conclude. Given their extensive experience with the immigration courts and BIA appeal process, *Amici* are uniquely positioned to provide insight into this narrow, but critical, issue.

ARGUMENT

I. BACKGROUND

Noncitizens are subject to detention during removal proceedings pursuant to several separate provisions of the Immigration and Nationality Act. *See* 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a). Section 1226 addresses the process for arresting and detaining certain noncitizens who have been convicted of criminal offenses. This case concerns Section 1226(c). While as a general matter Section 1226 permits releasing noncitizens on parole or bond pending a decision on their removal proceedings, Section 1226(c) explicitly "carves out a statutory category of

aliens who may *not* be released under § 1226(a)." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018) (emphasis in original). Specifically, that subsection requires the Government to detain any noncitizen pending a decision on their removal for "certain crimes of moral turpitude, controlled substance offenses, aggravated felonies, firearm offenses, or acts associated with terrorism." *Gordon v. Lynch*, 842 F.3d 66, 67 n.1 (1st Cir. 2016); *see also* 8 U.S.C. § 1226(c)(1).

Noncitizens, of course, may challenge their removal orders before an immigration judge, and may appeal any adverse determination to the BIA. However, due to the mandatory nature of their detention, noncitizens detained under Section 1226(c) may be detained months, *if not years*, with no bond hearing, while removal proceedings are pending. Unreasonably prolonged detentions implicate due process concerns; noncitizens may pursue their right to due process for such detentions via a petition for habeas corpus in federal court. *See Reid v. Donelan*, 390 F. Supp. 3d 201, 215 (D. Mass. 2019) ("*Reid III*"). This Court has elucidated the following nonexclusive factors to be considered when determining whether mandatory detention has become unreasonably prolonged, thus violating due process rights: (1) the total length of the detention; (2) the foreseeability that the proceedings will conclude in the near future; (3) the length of detention as compared to the criminal sentence; (4) the promptness of action by immigration authorities; and (5) the likelihood that the proceedings will conclude with a final removal order. *See Reid v.*

Donelan, 819 F.3d 486, 500–01 (1st Cir. 2016), *vacated and remanded in part*, 2018 WL 4000993 (1st Cir. May 11, 2018) ("*Reid II*").

II. THE BACKLOG OF CASES PENDING BEFORE THE IMMIGRATION COURTS AND THE BIA IMPACTS THE ABILITY OF COURTS TO ASCERTAIN WHEN APPEAL OR REMOVAL PROCEEDINGS WILL CONCLUDE

Against this legal backdrop, *Amici* write to express concern over the District Court's analysis of the second *Reid II* factor, which we refer to as the "foreseeability factor." In Mr. Alphonse's case, the District Court found it "foreseeable that the BIA will issue a decision on [Mr. Alphonse's] appeal in the near future" because his appeal was fully briefed. *See* ECF 20 at 17-18. No further evidence or analysis was offered in support of this conclusion. *See id.* This reasoning, however, is inherently speculative, and in Mr. Alphonse's case, flatly wrong. Indeed, the BIA appeal in Mr. Alphonse's case has now been pending for thirteen months, *nearly six of which have lapsed* since the District Court denied Mr. Alphonse's petition. Viewed today, the District Court's reasoning refutes itself—if at the time of the court's decision, the then nearly eight-month pendency of Mr. Alphonse's appeal made it "foreseeable" that the BIA would issue a decision "in the near future," (ECF 20 at 17), the months that have since elapsed without BIA decision aptly demonstrates the infirmity of the analysis. This assumption—that fully-briefed appeals are foreseeable to resolve in the near future—may work in the abstract, or with a perfectly efficient Immigration Court system, but the grim reality reflects a much more protracted process.

At a high level, any discussion of this protracted process would be incomplete without highlighting the backlog of pending cases facing immigration courts, which is growing faster than ever.[3] According to the Transactional Records Access Clearinghouse-Immigration ("TRAC"), the number of pending immigration cases now exceeds 1.8 million.[4] TRAC reported that the quarterly growth of pending Immigration Court cases between October and December 2021 increased by just under 140,000 cases—outpacing even the prior quarter by nearly 40,000 cases.[5] This growing backlog routinely forces individuals facing removal orders to wait years for finality: cases resulting in orders of removal took an average of 837 days to resolve in 2021, and are on pace to average 827 days in 2022. And these figures reflect *averages*.[6] Time to decision varies significantly depending on the hearing location. For example, cases resulting in orders of removal heard in New York City took an

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[3] Jasmine Aguilera, *A Record-Breaking 1.6 Million People Are Now Mired In U.S. Immigration Court Backlogs*, TIME, (Jan. 20, 2022, 11:31 AM), https://time.com/6140280/immigration-court-backlog/, (last visited June 30, 2022).

[4] *See* Transactional Records Access Clearinghouse (TRAC)-Immigration, *Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/, (last visited June 30, 2022).

[5] TRAC-Immigration, *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases*, https://trac.syr.edu/immigration/reports/675/, (last visited June 30, 2022).

[6] *See* TRAC-Immigration, "About the Data," https://trac.syr.edu/phptools/immigration/court_backlog/about_data.html, (last visited June 30, 2022) (describing how TRAC calculates average time for removal orders).

average of 1,176 days and cases heard in Hartford took an average of 1,068 days in 2021. Similarly, cases heard in Boston took an average of 844 days in 2021 and cases heard in Newark, New Jersey took an average of 1,455 days.[7]

Individuals who then appeal removal orders to the BIA may experience even longer delays. Indeed, the growing backlog of pending appeals before the BIA is equally as striking. Over the past six years, the BIA has experienced a ***646 percent increase*** in pending appeals—up from 11,129 in 2016 to 83,067 in the Second Quarter of 2022.[8] While the BIA predictably saw an uptick in case appeals filed during a portion of this time—reaching over 55,000 in 2019—it experienced a precipitous decrease in 2021 through the Second Quarter of 2022 (19,079 and 11,953 respectively). Notwithstanding this decrease, the number of *pending* appeals has remained over 80,000.[9] Furthermore, the 646 percent increase in pending appeals from 2016 through 2022 has not been accompanied by a commensurate increase in adjudication rate, which has remained relatively steady—sitting between 19,000 and

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[7] *See* TRAC-Immigration, Immigration Court Processing Time by Outcome, https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php, (last visited June 30, 2022) (To view a given state and hearing location, select "Average Days", "Removals", and then sort by "States").

[8] *See* U.S. Dep't of Justice, *Executive Office for Immigration Review Adjudication Statistics: Case Appeals Filed, Completed, and Pending* (data generated Apr. 18, 2022), https://www.justice.gov/eoir/page/file/1248501/download, (last visited June 30, 2022).

[9] *Id.*

33,000 with an average of approximately 22,000 per year.[10] To illustrate further, in 2016 the BIA had 11,129 pending appeals and adjudicated 19,286, by 2021, the number of pending appeals had surged to 82,056, yet the BIA adjudicated only 22,443.[11]

These figures paint a stark picture. BIA judges increasingly find themselves buried under rapidly expanding caseloads with no foreseeable relief. Some proposed solutions center on hiring more IJs.[12] But while additional IJs sitting in immigration courts may alleviate the backlog of removal proceedings to some extent at the trial court level, they are likely to exacerbate the already growing backlog of appeals before the BIA. In May 2021, the Executive Office for Immigration Review ("EOIR") explicitly highlighted this very risk in its Congressional Budget

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[10] *Id.*

[11] *Id.*

[12] *See* U.S. Department of Justice Executive Office for Immigration Review ("EOIR"), *FY 2022 Performance Budget, Congressional Budget Submission* (May 2021) (hereinafter "*EOIR Congressional Budget Submission*"), at 3-10, 23-30, https://www.justice.gov/jmd/page/file/1398386/download, (last visited June 30, 2022) (discussing the need for more judges and requesting additional funding to hire more IJs and staff to improve adjudication rates); *see also* Congressional Research Service, *U.S. Immigration Courts and the Pending Cases Backlog*, (Apr. 25, 2022), https://crsreports.congress.gov/product/pdf/R/R47077, at 29-33 (discussing hiring more IJs and its impact on the case backlogs); *see also* Cristobal Ramón, Tim O'Shea, *Why Hiring More Judges Would Reduce Immigration Court Backlogs*, Bipartisan Policy Center, July 25, 2018, https://bipartisanpolicy.org/blog/why-hiring-more-judges-would-reduce-immigration-court-backlogs/, (last visited June 30, 2022) (discussing how hiring more IJs could alleviate the increase in cases before the Immigration Courts).

Submission, writing that as the "number of immigration judges' [sic] increase, the BIA will likely continue to face a resultant increase in the number of appeals filed."[13] In other words, while more IJs might provide some evidence of greater efficiency at one level, this increase could lead to an even greater backlog of cases before the BIA.[14] And the BIA may be unable to control the growing backlog even were it successful in increasing its rate of adjudication. Indeed, despite completing 53 percent more cases in 2019, the BIA's backlog still grew over 18,000 according to the EOIR.[15] And this deluge of case appeals is unlikely to end soon. TRAC estimates that in 2022, the Immigration Court will see an influx of 800,000 new cases, which

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[13] *EOIR Congressional Budget Submission*, at 4-5, https://www.justice.gov/jmd/page/file/1398386/download, (last visited June 30, 2022).

[14] However, an increase in the number of IJs does not necessarily equate to a more efficient adjudication process. Indeed, despite having a record number of IJs in 2022, the backlog of pending cases is at its highest point yet. *See* Diane Solis, *Hiring lots of judges still hasn't stopped the backlog growth at U.S. immigration courts*, THE DALLAS MORNING NEWS, (Jan. 31, 2022, 7:00 A.M. CST), https://www.dallasnews.com/news/immigration/2022/01/31/hiring-lots-of-judges-still-hasnt-stopped-the-backlog-growth-at-us-immigration-courts/, (last visited June 30, 2022).

[15] EOIR Congressional Budget Submission, at 4-5, https://www.justice.gov/jmd/page/file/1398386/download, (last visited June 30, 2022) (explaining that the growing backlog of pending appeals is "shared across 23 permanent Board Members, an extremely large volume for any appellate body."). It also bears noting that EOIR relied on pending appeal numbers from 2019 to arrive at this conclusion, which were substantially lower than the pending appeals in 2020 through 2022. *Id.* Thus, it is fair to conclude that even if BIA adjudication efficiency remained at this 2019 rate cited by EOIR, the percentage of cases adjudicated would drop in 2020, 2021, and 2022.

amounts to "at least 300,000 more than the annual total the [Immigration] Court has *ever* received during its existence."[16]

III. A FAILURE TO ACCOUNT FOR THE BACKLOGS FACING IMMIGRATION COURTS LEADS TO AN ARBITRARY APPLICATION OF THE FORESEEABILITY FACTOR

A. The District Court Erred in Finding that the Foreseeability Factor Weighed in Favor of Finding Mr. Alphonse's Detention Reasonable

Noncitizens subject to mandatory detention pursuant to section 1226(c), such as Mr. Alphonse, are uniquely affected by this backlog. As cases wend through the Immigration Courts at an increasingly glacial pace, these individuals are forced to endure longer periods of detention, without being afforded a bond hearing. Given that the backlog is only likely to increase in 2022 according to TRAC, individuals who appeal IJ decisions stand to experience even longer detentions. Despite these realities, courts—including the District Court in deciding Mr. Alphonse's petition—largely have continued to operate under the assumption that a fully briefed appeal before the BIA necessarily means that the proceedings will conclude in the near

[16] *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases*, https://trac.syr.edu/immigration/reports/675/, (emphasis in original). TRAC's estimate may even be conservative. According to TRAC's "Immigration Court Quick Facts" page, Immigration Courts have received 566,779 new cases as of May 2022, and have only completed 228,937 during this same period. *See* TRAC-Immigration, *Immigration Court Quick Facts*, https://trac.syr.edu/immigration/quickfacts/?category=eoir, (last visited June 30, 2022).

future, causing courts to find that the second *Reid II* factor—the "foreseeability factor"—weighs against a finding of unreasonableness.[17]

To highlight the lack of support for this conclusion, it is worth reviewing the cases the District Court cited in analyzing the foreseeability factor. The District Court relied on two cases—*Dos Santos v. Moniz*, No. 21-CV-10611-PBS, 2021 WL 3361882, at *4 (D. Mass. May 18, 2021), and *Lewis v. Souza*, No. 20-CV-10848-PBS, 2020 WL 2543156, at *3 (D. Mass. May 19, 2020)—to support its conclusion that "it is foreseeable that the BIA will issue a decision on [Mr. Alphonse's] appeal in the near future" because his "BIA appeal is fully briefed." ECF 20 at 17. Both *Dos Santos* and *Lewis* arrived at similar conclusions by employing essentially the same reasoning: because the appeals before the BIA were "fully briefed," a decision in the near future was foreseeable.[18] This is somewhat like concluding it is

[17] As discussed *supra* Section I, the second factor courts should consider when determining whether detention has become unreasonably prolonged is the foreseeability that the proceedings will conclude in the near future. *See Reid II*, 819 F.3d at 500–01 (setting forth the nonexclusive factors courts should consider).

[18] Neither case engaged in any review of relevant statistics to arrive at the conclusion that a fully briefed appeal necessarily means a forthcoming decision. In *Lewis*, the Court concluded that because the petitioner's appeal was "at an advanced stage, with briefing submitted," and noted in the "Facts" section that ICE had filed a motion to expedite the proceedings, a decision was forthcoming and thus this factor weighed in favor of the government. 2020 WL 2543156, at *3. In arriving at a similar conclusion—that "Petitioner's case [was] nearing resolution" because "[h]is appeal is fully briefed and has been pending before the BIA for three months," and ICE had filed a motion to expedite—the District Court in *Dos Santos* cited *Lewis* to find that this factor weighed in favor of the government. 2021 WL 3361882, at *4.

foreseeable that a fully-loaded, fully-fueled aircraft that is pushing back from the gate will take off in the near future, without taking into account factors such as weather, traffic, and location. Any seasoned traveler could spot the flaw in that logic.

Critically, while *Dos Santos* cited *Lewis* to support the proposition that "fully briefed" is tantamount to nearly decided, *Lewis* did not cite to any cases or other authorities, and instead simply concluded that because the petitioner's appeal was "at an advanced stage, with briefing submitted" a decision would be forthcoming shortly. 2020 WL 2543156, at *3. This bare-bones analysis, notably disconnected from the case backlogs facing immigration courts, reveals a degree of arbitrariness in how the foreseeability factor is analyzed by courts.[19] But this is not confined only to cases where a District Court finds that this factor weighs against a finding of unreasonableness. In *Campbell v. Moniz*, 20-CV-10697-PBS, 2020 WL 1953611, at *3 (D. Mass. Apr. 23, 2020), the District Court found that because the petitioner's

[19] The District Court in *Martinez Lopez v. Moniz*, 21-CV-11540-FDS, 2021 WL 6066440, at *6 (D. Mass. Dec. 22, 2021) similarly found it foreseeable that proceedings will conclude in the near future where the petitioner's appeal was at an advanced stage, again citing both *Lewis* and *Dos Santos* in support of this conclusion. Other courts have similarly addressed the foreseeability factor in summary fashion. *See, e.g.*, *Decarvalho v. Souza*, No. 20-11036-PBS, 2020 WL 3498270, at *3 (D. Mass. June 29, 2020) (simply noting that "[p]etitioner's appeal is at an advanced stage, with briefing submitted"); *Da Graca v. Souza*, No. 20-cv-10849-PBS, 2020 WL 2616263, at *3 (D. Mass. May 22, 2020) (finding this factor weighed in favor of the petitioner where the appeal was pending, ICE had filed a motion to expedite, and the court was not aware that a briefing schedule was set).

appeal had been filed two months before the court's decision, and no briefing schedule had been issued, "it [was] not likely that proceedings will conclude in the near future," even though ICE had filed a motion to expedite the appeal. Just as in *Lewis*, the District Court in *Campbell* referenced neither caselaw nor statistics in arriving at its conclusion.[20]

Amici highlight these decisions to demonstrate that courts analyze the foreseeability factor in summary fashion without taking into account other relevant considerations, let alone assessing the impact contemporaneous conditions affecting the Immigration Courts might have on this factor. Instead, courts essentially engage in what amounts to an assessment of probabilities predicated on theories about the timing of immigration court decisions. This is not to say that the Court in *Lewis* may be incorrect in postulating that because an appeal is pending "with briefing submitted" that the BIA might issue a decision the next day, or conversely, that the Court in *Campbell* was incorrect in assuming that "it is not likely that proceedings will conclude in the near future" because the BIA had not yet set a briefing schedule,

[20] *Compare id.*, *with Lewis*, 2020 WL 2543156, at *3. It also bears pointing out that both *Lewis* and *Campbell* stated that ICE had filed a motion to expedite the appeal, but neither court explicitly noted whether that motion had been granted. Nevertheless, *Campbell* used the *lack of knowledge* concerning whether the motion to expedite was granted to support its finding that the proceedings were not going to conclude in the near future, whereas *Lewis* declined to analyze the effect of the motion to expedite one way or another. This further highlights the potential for arbitrary conclusions—as it would seem here that two courts drew opposite conclusions despite having similar information.

but rather that these conclusions are rooted more in probabilities rather than an assessment of the case backlogs and current state of the BIA at a given point in time. Certainly, we can agree that every day that passes brings the ultimate decision one day closer, just as, conversely, it means that one more day has passed without the case being completed. But that generality offers insufficient analysis of Mr. Alphonse's specific case to adequately protect his due process rights.

Given the backlog of pending cases before the BIA, which has ballooned in the previous three years, the assumption that "fully briefed" means nearing completion is untenable and increasingly disconnected from the realities of the BIA's workload. Continuing to allow courts to analyze the foreseeability factor in a vacuum will invariably result in more noncitizens spending significant time in mandatory detention as their appeals languish. Indeed, this Court need look no further than Mr. Alphonse's case to highlight these adverse consequences: Mr. Alphonse has sat in mandatory detention for nineteen months and his appeal to the BIA has been pending for thirteen months. ECF 20 at 17-18.[21] These ramifications,

[21] It bears noting that is already substantially longer than the three-month median completion time for removal proceedings analyzed by the District Court in *Reid III*. In *Reid III*, the District Court analyzed twenty-years of data on the duration of removal proceedings in the Boston and Hartford Immigration Courts for individuals detained under Section 1226(c). 390 F. Supp. 3d at 212. Additionally, the District Court's determination fails to account for any additional time that could accrue if Mr. Alphonse appeals an adverse BIA decision to this Court, a period of time the District Court acknowledged "is of course speculative." ECF 20 at 17 n.13. While

however, are neither unforeseeable nor improbable given the backlog of pending cases facing the BIA.

B. To Comport with Due Process, the Foreseeability Factor Should Account for Case Backlogs Impacting Immigration Courts

Application of the foreseeability factor does not lend itself well to a simple calculation based on the probability that the BIA will resolve any given appeal in short order. This is especially true given the growing backlogs before the BIA and the Immigration Courts, which introduces even more uncertainty into this already complicated calculation.

To account for these growing backlogs, *Amici* respectfully suggest that this Court consider analyzing the foreseeability factor in a more comprehensive manner. Conclusions—such as the one made by the District Court in Mr. Alphonse's case—that equate "fully briefed" with a foreseeable final decision simply do not reflect the very real possibility that noncitizens subject to mandatory detention will wait months—or in Mr. Alphonse's case thirteen months—despite having a fully briefed appeal. This foreseeability gap could be addressed, for example, by including a greater reliance on case statistics (including both national and region-specific case activity, as well as exogenous factors such as the COVID-19 pandemic) to evaluate

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there certainly is a degree of speculation involved, as the District Court reasoned in *Reid v. Donelan*, 991 F. Supp. 2d 275, 282 (D. Mass. 2014) ("*Reid I*"), "the date is certainly far enough out to implicate due process concerns."

the likelihood that removal proceedings will conclude in the near future, or holding that courts must conduct a more robust analysis of the foreseeability factor.[22] However, *Amici* write not to provide this Court with a definitive set of approaches, but rather to highlight a very clear issue that directly influences one of the

[22] For example, this Court could hold that district courts must conduct a thorough analysis of the likelihood that a removal case will conclude in the near future, which could include but not be limited to: (1) the status of briefing before the Immigration Courts; (2) a review of the conditions and current state of pending cases before the Immigration Courts and relevant adjudication rate statistics; (3) the likelihood that a petitioner will appeal an adverse BIA decision to the Court of Appeals; and (4) the likelihood that a decision from the BIA will actually result in immediate removal as opposed to future challenges and appeals. Courts could also analyze the second factor in greater tandem with the first—and most important factor—the length of mandatory detention. *See Reid III*, 390 F. Supp. 3d at 219 ("The total length of the detention is the most important factor."). Other courts have found that this factor weighed in favor of finding the length of detention unreasonable where the BIA's delay in adjudication exacerbated what was an already unreasonable length of mandatory detention. *See* ACLU, *Practice Advisory: Prolonged Mandatory Detention and Bond Eligibility in the United States Court of Appeals for the Third Circuit*, (updated Sept. 14, 2020), at 6 n.38, https://www.aclu.org/sites/default/files/field_document/09.14.2020_-_ca3_detention_practice_advisory_final.pdf, (last visited June 30, 2022) (collecting cases for the proposition that prolonged future detention pending BIA adjudication weighed in favor of a finding of unreasonableness). This Court could also direct courts to account for the potential increase in detention length if a petitioner appeals their BIA decision to the Court of Appeals—which the District Court in Mr. Alphonse's case acknowledged was a distinct possibility, but declined to take this into account because the Court in *Reid III* "did not take a position on [the] issue of whether 'the period of time while a petition for review with a circuit court is pending should factor into the reasonableness analysis.'" ECF 20 at 17 n.13 (*quoting Reid III*, 390 F. Supp. 3d at 219 n.4). The Third Circuit, for example, takes this time into account when addressing the foreseeability factor. *See, e.g.*, *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 212 (3d Cir. 2020) (taking into account the likelihood that the individual may appeal an adverse BIA decision to the Court of Appeals in finding that his continued detention is likely).

nonexclusive factors this Court has directed district courts to use when determining whether Section 1226(c) detention is unreasonable.

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"Detention," this Court aptly noted in *Brito v. Garland*, "is the quintessential liberty deprivation." 22 F.4th 240, 252–53 (1st Cir. 2021) (*quoting Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). As this Court determines how to account for the growing backlog of cases before the Immigration Courts, it bears revisiting this Court's decision in *Reid II*, specifically that portion addressing the appropriateness of mandatory detention during the pendency of a noncitizens' appeal. Citing the Supreme Court's decision in *Demore v. Kim*, this Court wrote that "detention for a number of months remains appropriate 'in the minority of cases in which *the alien* chooses to appeal,'" but that "within this limited timeframe, a presumption of removability remains and a presumption of promptness remains." *Reid II*, 819 F.3d at 500 n.4 (*quoting Demore v. Kim*, 583 U.S. 510, 530 (2003)) (emphasis in original). This Court, however, trenchantly observed that "there may come a time when *promptness lapses*, [and] aliens may be detained for 'several months' before this point is reached." *Id.* (*quoting Demore*, 583 U.S. at 529 n.12) (emphasis added).

This "time" has come. Promptness has certainly lapsed. For nineteen months, Mr. Alphonse has remained in mandatory detention. His appeal at the BIA has been pending now for thirteen months, nearly six of which elapsed since the District Court

concluded that a BIA decision was foreseeable in the near future. The District Court's decision—based on little more than an assertion that "fully briefed" meant "decision forthcoming"—demonstrates the need to reassess how courts analyze the foreseeability factor to better account for a broader set of circumstances and considerations that bear upon the adjudication of cases pending before the Immigration Courts.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court should: (1) find that the second *Reid II* factor weighs in favor of finding Mr. Alphonse's detention unreasonable because it is not readily foreseeable that his BIA appeal will conclude in the near future; (2) reassess how District Courts analyze the foreseeability that a removal proceeding will conclude in the near future in light of the growing backlog of cases facing the Immigration Courts and the BIA; and (3) ensure that District Courts take into account a broader set of facts and circumstances that bear upon the likelihood that a removal proceeding will conclude when analyzing this factor.

Dated: July 5, 2022

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ *Evan M. Piercey*
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Dated: July 5, 2022

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2022, this amicus brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the CM/ECF system, which will automatically send an email notification of such filing to the attorneys of record who are registered CM/ECF users.

/s/ *Evan M. Piercey*
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Dated: July 5, 2022

APPENDIX OF *AMICI CURIAE*

Hon. Steven Abrams, Immigration Judge, New York, Varick St., and Queens Wackenhut, 1997–2013

Hon. Terry A. Bain, Immigration Judge, New York, 1994–2019

Hon. Dayna M. Beamer, Immigration Judge, Honolulu, 1997–2021

Hon. Sarah M. Burr, Assistant Chief Immigration Judge and Immigration Judge, New York, 1994–2012

Hon. Esmerelda Cabrera, Immigration Judge, New York, Newark, and Elizabeth, NJ, 1994–2005

Hon. Jeffrey S. Chase, Immigration Judge, New York, 1995–2007

Hon. George T. Chew, Immigration Judge, New York, 1995–2017

Hon. Matthew D'Angelo, Immigration Judge, Boston, 2003–2018

Hon. Bruce J. Einhorn, Immigration Judge, Los Angeles, 1990–2007

Hon. Cecelia M. Espenoza, Appellate Immigration Judge, Board of Immigration Appeals, 2000–2003

Hon. Noel A. Ferris, Immigration Judge, New York, 1994–2013

Hon. James R. Fujimoto, Immigration Judge, Chicago, 1990–2019

Hon. Jennie Giambastiani, Immigration Judge, Chicago, 2002–2019

Hon. John F. Gossart, Jr., Immigration Judge, Baltimore, 1982–2013

Hon. Alberto E. Gonzalez, Immigration Judge, San Francisco, 1995–2005

Hon. Paul Grussendorf, Immigration Judge, Philadelphia and San Francisco, 1997–2004

Hon. Miriam Hayward, Immigration Judge, San Francisco, 1997–2018

Hon. Charles M. Honeyman, Immigration Judge, New York and Philadelphia, 1995–2020

Hon. William P. Joyce, Immigration Judge, Boston, 1996–2002

Hon. Carol King, Immigration Judge, San Francisco, 1995–2017

Hon. Elizabeth A. Lamb, Immigration Judge, New York, 1995–2018

Hon. Dana Leigh Marks, Immigration Judge, San Francisco, 1987–2021

Hon. Margaret McManus, Immigration Judge, New York, 1991–2018

Hon. Robin Paulino, Immigration Judge, San Francisco, 2016–2020

Hon. Charles Pazar, Immigration Judge, Memphis, 1998–2017

Hon. Laura Ramirez, Immigration Judge, San Francisco, 1997–2018

Hon. Lory D. Rosenberg, Appellate Immigration Judge, Board of Immigration Appeals, 1995–2002

Hon. Susan G. Roy, Immigration Judge, Newark, 2008–2010

Hon. Paul W. Schmidt, Chairperson and Appellate Immigration Judge, Board of Immigration Appeals, 1995–2003; Immigration Judge, Arlington, VA, 2003–2016

Hon. Ilyce S. Shugall, Immigration Judge, San Francisco, 2017–2019

Hon. Patricia M. B. Sheppard, Immigration Judge, Boston, 1993–2006

Hon. Helen Sichel, Immigration Judge, New York, 1997–2020

Hon. Andrea Hawkins Sloan, Immigration Judge, Portland, 2010–2017

Hon. Tuê Phan-Quang, Immigration Judge, San Francisco, 1995–2012

Hon. Gabriel C. Videla, Immigration Judge, New York and Miami, 1994–2022

Hon. Robert D. Vinikoor, Immigration Judge, Chicago, 1984–2017

Hon. Polly A. Webber, Immigration Judge, San Francisco, 1995–2016

Hon. Robert D. Weisel, Assistant Chief Immigration Judge, Immigration Judge, New York, 1989–2016