IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

L.M.U.,
Plaintiff,

v.

JEAN KING,
as Acting Director, Executive Office for Immigration Review,

H. KEVIN MART,
as Acting Assistant Chief Immigration Judge (Varick Street Immigration Court), Executive Office for Immigration Review,

CHARLES CONROY,
as Immigration Judge (Varick Street Immigration Court), Executive Office for Immigration Review,

MERRICK GARLAND,
as U.S. Attorney General,

Defendants.

Civil Action No. 21-3978 (PGG)

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC works to uphold constitutional protections for noncitizens as well as for citizens, and to ensure meaningful access to the courts. Accordingly, CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

For over sixteen months, the federal government has detained L.M.U., a young asylum-seeker, in connection with pending removal proceedings. Compl. ¶ 1. During this period of time—while L.M.U.'s mental health has deterioriated, *id.* ¶ 3, and COVID-19 outbreaks have devastated prisons and jails around the country, *id*. ¶ 36—the United States Court of Appeals for the Second Circuit concluded in *Velasco Lopez v. Decker* that the Fifth Amendment's Due Process Clause entitles an individual in removal proceedings to a bond hearing in which the government bears the burden of proving, by clear and convicing evidence, that the individual is a danger to the community or a flight risk, at least when the individual's detention becomes prolonged. 978 F.3d 842, 856-57 (2d Cir. 2020).

All L.M.U. seeks is that hearing. Yet an immigration judge, consistent with an apparent policy at the Varick Street Immigration Court of refusing to comply with *Velasco Lopez*'s constitutional holding, declared that "this administrative court has no power to address a

[1] No person or entity other than *amicus* and its counsel assisted in or made a monetary contribution to the preparation or submission of this brief. Plaintiff consents to the filing of this brief. As described in the attached motion, as of the time of this filing, the government has not provided its position on the filing of the proposed brief.

constitutional question, *i.e.*, whether [L.M.U.'s] prolonged detention has given rise to a due process violation." Compl. ¶ 7. L.M.U. thus filed suit in this court, seeking to vindicate his right to due process and "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1).

Rather than acknowledging the Second Circuit's holding in *Velasco Lopez* and facilitating the speedy adjudication of L.M.U.'s right to a constitutionally adequate bond hearing, the government now asserts that L.M.U. cannot proceed in this court with his APA claim because he might instead have filed suit in a different district court, seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2241. That argument is based on the government's reading of a provision of the APA, which makes reviewable "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The government's reading is wrong: that language does not bar APA review simply because habeas corpus relief might also be available.

As the text and history of the APA show, Congress included the "no other adequate remedy in a court" language merely to avoid "duplicat[ing]" those "statutes [that] defined the specific procedures to be followed in reviewing a particular agency's action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). As then–Attorney General Tom C. Clark put it in an interpretive memorandum appended to the Senate Judiciary Committee's report on the APA, "where a *special* statutory method is provided for reviewing a *given type of case* in the courts, that procedure shall be used." S. Rep. No. 79-752, at 230 (1945) (emphases added); *see also* Tom C. Clark, U.S. Dep't of Just., *Attorney General's Manual on the Administrative Procedure Act* 101 (1947) (explaining that § 704 "does not provide additional judicial remedies in situations where the Congress has provided *special and adequate* review procedures" (emphasis added)). The types of "special statutory methods" to which Clark was referring were those statutes that channeled review of

certain types of orders issued by particular federal agencies, not broad statutes like 28 U.S.C. § 2241 that "provide a general authorization for review," *Bowen*, 487 U.S. at 903. Indeed, in the section of the APA immediately preceding § 704, Congress explicitly referred to a writ of habeas corpus as a remedy that a court, conducting judicial review pursuant to the APA, may impose "in the absence or inadequacy" of a "special statutory review proceeding." 5 U.S.C. § 703. Certainly, if Congress viewed habeas corpus as a form of relief that would be available where a "special statutory review proceeding" was "inadequate," Congress did not construe habeas corpus as one of those "special statutory review" procedures itself.

Moreover, the Supreme Court has explained, and the courts of appeals have repeatedly emphasized, that the "primary thrust of § 704 was to codify the [APA's] exhaustion requirement," *Bowen*, 487 U.S. at 903, not to stand in the way of judicial review. Thus, the Second Circuit "requires clear and convincing evidence of congressional intent to overcome" the APA's "'strong presumption in favor of judicial review' of administrative action." *Larson v. United States*, 888 F.3d 578, 587 (2d Cir. 2018) (quoting *Sharkey v. Quarantillo*, 541 F.3d 75, 84 (2d Cir. 2008)); *see also* H.R. Rep. No. 79-1980, at 41 (1946) ("To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it."); *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962) ("[T]he Court will not hold that the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions . . . in the absence of clear and convincing evidence that Congress so intended."), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). That evidence is entirely lacking here, both in the text of 28 U.S.C. § 2241, the general habeas statute that the government urges L.M.U. to invoke, and in the text of 8 U.S.C. § 1226(a), the general immigration detention provision pursuant to which L.M.U. is being held. And since the enactment

of the APA, Congress has amended immigration laws and detention review procedures in numerous significant ways, but it has never designated habeas as the *exclusive* form of review over agency procedures regarding detention and release.

As the D.C. Circuit recently cautioned, courts should "avoid lightly 'construe[ing] [section 704] to defeat the [APA's] central purpose of providing a broad spectrum of judicial review of agency action.'" *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 846 F.3d 1235, 1244 (D.C. Cir. 2017) (alterations in original) (quoting *Bowen*, 487 U.S. at 903). This court should heed that warning and deny the government's motion to dismiss.

ARGUMENT

I. Section 704 Bars APA Review Only Where Congress Created a Special Statutory Review Procedure for a Specific Type of Agency Action, and that Special Statutory Procedure Provides an Adequate Remedy.

The first sentence of § 704 of the APA makes reviewable "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Relevant text, history, and statutory structure all demonstrate that Congress wrote this provision to avoid "duplicat[ing] existing procedures for review of agency action" where "Congress has provided special and adequate review procedures." *Bowen*, 487 U.S. at 903 (internal quotation marks omitted). Habeas corpus is not one of those procedures.

The most striking textual aspect of § 704 is that it is written in the affirmative. When first enacted as § 10(c) of the APA, *see* Administrative Procedure Act, Pub. L. No. 79-404, § 10(c), 60 Stat. 237, 243 (1946), the provision read, "[e]very agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court *shall be subject to judicial review.*" APA § 10(c) (emphasis added). Today, the language remains largely the same: "[a]gency action made reviewable by statute and final agency action for which there is no

other adequate remedy in a court *are subject to judicial review*." 5 U.S.C. § 704. The affirmative thrust of § 704 stands in stark contrast to other provisions of the APA limiting judicial review, like the specifically delineated "except[ions]" in § 701 stating that judicial review is *not available* where "statutes preclude judicial review," *id.* § 701(a)(1), or "agency action is committed to agency discretion by law," *id.* § 701(a)(2). Consistent with § 704's broad and affirmative language in favor of APA review, the Supreme Court has instructed that § 704 should be "given a 'hospitable' interpretation," *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 141 (1967) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)), *abrogated on other grounds by Califano*, 430 U.S. 99, and construed consistent with the "congressional intention that it cover a broad spectrum of administrative actions," *id.* at 140. Therefore, any exception to the rule in favor of APA review created by § 704 must be construed narrowly. *Accord Sharkey*, 541 F.3d at 90 n.14 (noting that the "no other adequate remedy" provision of § 704 should be "narrowly construed").

Congress did not specifically define the "other adequate remedy" exception in the APA, but it did refer to the concept of an "adequate" remedy or procedure in a neighboring provision, shedding light on the proper construction of the similar language used in § 704. *See* S. Rep. No. 79-752, at 216 ("The [APA] is designed to operate as a whole and . . . its provisions are interrelated."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." (internal citations and quotation marks omitted)). That neighboring provision specifies that "[t]he form of proceeding for judicial review is the *special statutory review proceeding* relevant to the subject matter in a court specified by statute or, in the absence or *inadequacy* thereof, any applicable form of legal action." 5 U.S.C. § 703 (emphases added). Section 703 thus makes clear that Congress planned for APA review to be available even

where it had provided a "special statutory review proceeding" if that proceeding was "inadequate." The inverse of that principle appears in § 704—that is, in order to read § 703 and § 704 coherently, § 704 must be understood to bar APA review only when there is a "special statutory review proceeding" that provides an "adequate" remedy. But if there is no "special statutory review proceeding" provided by Congress at all, APA review is not precluded—regardless of the proceeding's practical adequacy. *Cf. Zellous v. Broadhead Assocs*., 906 F.2d 94, 100 (3d Cir. 1990) ("Regardless [of] whether § 1404a is available, we do not believe that this provision, which serves only to permit suit against HUD, is the kind of ''special and adequate review procedure' that will oust a district court of its normal jurisdiction under the APA.'" (quoting *Bowen*, 487 U.S. at 904)).

The history of the APA supports this interpretation. In numerous reports and memoranda accompanying the passage of the Act, Congress made clear that § 704 bars APA review only where Congress created a special statutory review procedure for a specific type of agency action. For example, in an interpretive memorandum appended to the Senate Judiciary Committee's report on the APA, Congress described § 704 as requiring that "where a *special* statutory method is provided for reviewing a *given type of case* in the courts, that procedure shall be used." S. Rep. No. 79-752, at 230 (emphases added). And in Attorney General Clark's APA Manual issued in 1947, widely considered an authoritative source for interpreting the original meaning of the APA, *see, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (explaining that the Attorney General's Manual is "the Government's own most authoritative interpretation of the APA . . . which we have repeatedly given great weight"), Clark explained that § 704 "does not provide additional judicial remedies in situations where the Congress has provided *special* and adequate review procedures," Clark, *supra*, at 101 (emphasis added).

In other legislative materials, Congress did not even treat the "other adequate remedy in a court" language as a bar to judicial review separate and apart from the finality requirement at all, explaining that § 704 was only "designed . . . to negative any intention to make reviewable merely preliminary or procedural orders where there is a subsequent and adequate remedy at law available, as is presently the rule." Staff of S. Comm. on the Judiciary, 79th Cong., Rep. on Admin. Proc. 37 (Comm. Print 1945); *see* Sarah L. Brinton, *Toward Adequacy*, 69 N.Y.U. Ann. Surv. of Am. L. 357, 408 (2013) ("[T]he thrust of this explanation seems directed toward ensuring finality."); 92 Cong. Rec. 2163 (1946) (statement of Sen. E.C. Johnson) ("Only final actions, rules, or orders, or those for which there is no other adequate judicial remedy are reviewable; *in other words, a recognition of the principle of the exhaustion of administrative remedies*." (emphasis added) (quoting Allen Moore, *The Proposed Administrative Procedure Act*, Dicta, Jan. 1945)). This evidence—that Congress may not have even planned for courts to treat the "other adequate remedy" language as anything more than "a restatement of the proposition that '[o]ne need not exhaust administrative remedies that are inadequate,'" *Bowen*, 487 U.S. at 902 (quoting Kenneth Culp Davis, *Administrative Law* § 26:11, at 464 (2d ed. 1983))—further counsels in favor of construing the "other adequate remedy in a court" bar to APA review narrowly. To effectuate Congress's plan, courts should bar APA review only where Congress has delineated a "special" or particularized procedure for review of specific types of agency action, and that special procedure provides an "adequate" remedy.

Indeed, this makes sense: "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum [like the APA]." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). After all, "when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute

in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions." *Id.* (quoting T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 98 (2d ed. 1874)). This rule, however, does not apply if the "other alternative remedy" is just as broad and general as the APA itself.

Consistent with this logic, the Supreme Court in *Bowen v. Massachusetts* held that the Tucker Act, a broad statute generally authorizing damages suits in the United States Court of Federal Claims, is "plainly not the kind of 'special and adequate review procedure' that will oust a district court of its normal jurisdiction under the APA." 487 U.S. at 904. In conducting its analysis of § 704, the Court provided examples of the types of special statutory procedures Congress likely had in mind when it wrote that provision: laws like those providing for review of Federal Trade Commission (FTC) orders, National Labor Relations Board (NLRB) orders, and Interstate Commerce Commission (ICC) orders. *See id.* at 903. Prior to the passage of the APA, Congress had enacted detailed procedures in the FTC and NLRB's organic statutes pursuant to which FTC and NLRB orders were subject to direct judicial review in the regional courts of appeals without the involvement of district courts. *See* 15 U.S.C. § 45(c) (1940); 29 U.S.C. § 160(f) (1946). Similarly, under a law that has since been repealed, *see* 38 Stat. 219 (1913) (repealed by 49 U.S.C. App. § 17 (1988)), ICC orders "were subject to review in specially constituted three-judge district courts," *Bowen*, 487 U.S. at 903. As the Court in *Bowen* explained, Congress did not intend the general authorization of review of agency action in the APA to displace these "statutes creating administrative agencies [that] defined the specific procedures to be followed in reviewing a particular agency's action." *Id.*

Habeas corpus is not like these statutes. It is "a writ antecedent to statute, . . . throwing its root deep into the genius of our common law." *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (internal quotation markes omitted). When Congress wrote that writ into our statute books, first in Section 14 of the Judiciary Act of 1789, and eventually, as relevant here, in 28 U.S.C. § 2241, its purpose was both to codify the writ and expand its availability and scope, rather than foreclose other forms of judicial review. *See, e.g.*, *Rasul v. Bush*, 542 U.S. 466, 474 (2004) ("As it has evolved over the past two centuries, the habeas statute clearly has expanded habeas corpus 'beyond the limits that obtained during the 17th and 18th centuries.'" (quoting *Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977)). Section 2241 thus provides for review of a wide range of claims by individuals subject to liberty constraints, without referring to any specific type of agency or agency action. *See, e.g.*, *Jiminian v. Nash*, 245 F.3d 144, 146 (2d Cir. 2001) (listing common circumstances in which "motion[s] pursuant to § 2241" are filed, "including such matters as the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions" (citing *Chambers v. United States*, 106 F.3d 472, 474-75 (2d Cir. 1997))). Indeed, § 2241 may be invoked to challenge detention decisions not even made by agencies at all, such as those made by courts. *See* 28 U.S.C. § 2241 (speaking in general terms without reference to particular agency action); *Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) ("[I]t is § 2241 that provides *generally* for the granting of writs of habeas corpus by federal courts, implementing 'the *general* grant of habeas authority provided by the Constitution.'" (emphases added) (quoting *White v. Lambert*, 370 F.3d 1002, 1006 (9th Cir.), *cert. denied*, 543 U.S. 991 (2004))).

Again, close examination of § 704, particularly in the larger context of the APA, confirms that Congress never considered a writ of habeas corpus to be the sort of "other adequate remedy"

that would preclude APA review. In the section of the APA immediately preceding § 704, Congress explicitly referred to a writ of habeas corpus as a remedy that a court, conducting judicial review *pursuant to an APA cause of action*, may impose "in the absence or inadequacy" of a "special statutory review proceeding." 5 U.S.C. § 703. If Congress contemplated habeas corpus being available as a form of relief when a "special statutory review proceeding" was "inadequate," it plainly did not view habeas corpus as one of those "special statutory review" procedures. *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995) ("Although § 10 [of the Securities Act of 1933] does not define what a prospectus is, it does instruct us what a prospectus cannot be if the Act is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout."). In other words, a writ of habeas corpus is one form of relief that courts may grant pursuant to the APA when there is "no other adequate remedy in a court," 5 U.S.C. § 704; *see also* Walter Gellhorn, *Administrative Law: Cases and Comments* 809 (2d ed. 1947) ("Only after it is clear that no legislative disposition of the appropriate procedure has been made may one with safety think in such general terms as *injunction*, *habeas corpus*, *mandamus*, etc."). Habeas corpus is not a remedy that, if available under a broad statute like § 2241, displaces the right to file a lawsuit under the APA.

II. There Is No Clear and Convincing Evidence that Congress Intended APA Review to Be Unavailable Simply Because Habeas Corpus Review May Be Available.

It is well established that "'the APA's strong presumption in favor of judicial review' of administrative action requires clear and convincing evidence of congressional intent to overcome." *Larson*, 888 F.3d at 587 (quoting *Sharkey*, 541 F.3d at 84); *see Citizens for Resp. & Ethics in Wash.*, 846 F.3d at 1244 ("When considering whether an alternative remedy is 'adequate' and therefore preclusive of APA review, we look for 'clear and convincing evidence' of 'legislative intent' to create a special, alternative remedy and thereby bar APA review." (quoting *Garcia v.*

Vilsack, 563 F.3d 519, 523 (D.C. Cir. 2009)). Yet Congress has never "referred to" nor "adopt[ed]" § 2241 as the "appropriate mode of review," S. Rep. No. 79-752, at 212-13, of an agency's procedures regarding immigration detention. Indeed, since the APA's passage, Congress has in several instances amended immigration law to preserve habeas review for detained noncitizens, but it has never used habeas to "provide[] an independent cause of action" nor to create an "alternative review procedure" for claims concerning detention, *Citizens for Resp. & Ethics in Wash.*, 846 F.3d at 1245 (internal quotation marks omitted).

When Congress passed the APA in 1946, writs of habeas corpus were the sole means of reviewing all immigration decisions, including those involving detention. Nevertheless, existing immigration statutes did not reference habeas actions, making clear that habeas corpus was not a specialized form of review. *See Kristensen v. McGrath,* 179 F.2d 796, 799 (D.C. Cir. 1949), *aff'd*, 340 U.S. 162 (1950) ("The immigration statute here relevant makes no reference to habeas corpus and hence, that remedy cannot fit within the category of 'special statutory review.'"); Note, *The Impact of the Federal Administrative Procedure Act on Deportation Proceedings*, 49 Colum. L. Rev. 73, 82 (1949) (concluding that "it is highly questionable whether [the phrase 'special statutory procedure'] can be stretched sufficiently to include a form of procedure chosen by the courts alone without legislative guidance").

When Congress revised the Immigration & Nationality Act (INA) in 1952, it specifically *prohibited* non-habeas review of certain types of immigration decisions, but it did not prohibit non-habeas claims from detained noncitizens. *Compare* 8 U.S.C. § 1503(c) (1958) (denial of certificate of identity subject to review "in habeas corpus proceedings *and not otherwise*" (emphasis added)), *with id.* § 1252(a) (1958) ("Any court of competent jurisdiction shall have authority to review . . . any determination of the Attorney General concerning detention . . .

pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch."). Congress thus knew how to speak clearly when it intended habeas corpus to be the sole remedy or method of review. It did not do so with respect to claims like L.M.U.'s.

In subsequent revisions to immigration law, Congress preserved habeas jurisdiction over detention decisions, but it never designated habeas as the *exclusive* form of review over such claims, especially not over claims like L.M.U.'s that merely challenge detention determination *procedures*. Significantly, the 87th Congress created a form of special statutory review—the petition for review—and provided that it would be the "sole and exclusive procedure" for judicial review of final orders of deportation, *see INS v. St. Cyr*, 533 U.S. 289, 309 (2001) (quoting 75 Stat. 651), but it did not use similar language to channel detention issues to habeas claims. While Congress specified that noncitizens in custody could "obtain judicial review thereof by habeas corpus proceedings," 8 U.S.C. § 1105a(a)(9) (1964), it did not designate habeas as a special or exclusive custody review procedure, and instead merely clarified that the petition for review process "in no way disturb[ed] the Habeas Corpus Act," H.R. Rep. No. 87-1086, at 29 (1961); 107 Cong. Rec. 12,177 (1961) (remarks of Rep. Walter) (explaining that the 1961 Act preserves habeas for excludable aliens because "[w]e were very much concerned over the possibility of writing an unconstitutional statute by depriving even an alien of the right to a writ of habeas corpus").

In later amendments, Congress continued to designate some judicial review procedures as "exclusive," but did not do so for those pertaining to habeas review of detention decisions. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress provided that "[j]udicial review of all questions of law and fact" would be available *only* in a petition for review. 8 U.S.C. § 1252(b)(9); *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070 (2020) (discussing

§ 1252(b)(9), known as the "zipper clause"). In the REAL ID Act of 2005, Congress amended this provision to eliminate habeas jurisdiction over challenges to removal orders, *id.* at 1071, further providing that the petition for review was the "exclusive means for judicial review of an order of removal," 8 U.S.C. § 1252(a)(5). While Congress emphasized that its actions "would not preclude habeas review over challenges to detention," H.R. Rep. No. 109-72, at 175 (2005), it provided no indication that habeas was the "only," 8 U.S.C. § 1252(b)(9), or "exclusive," *id.* § 1252(a)(5), vehicle for such challenges; *see also* H.R. Rep. No. 104-469, at 413 (1995) (eliminating the passing reference to habeas corpus as a non-exclusive form of judicial review of detention decisions when "the Attorney General is not proceeding with . . . reasonable dispatch," thus leaving no explicit statutory reference to habeas review of such decisions).

Significantly, Congress has specifically directed review of certain decisions—namely, those concerning expedited removal—to habeas corpus actions, but has not done so for decisions concerning detention and bond. *Compare* 8 U.S.C. § 1226(e) (entitled "[j]udicial review" and making no reference to habeas proceedings, or any particular proceedings for that matter), *with id.* § 1252(e)(2) (entitled "[h]abeas corpus proceedings" and providing that "[j]udicial review of any determination made [concerning expedited removal] is available in habeas corpus proceedings, but shall be limited to [certain determinations]"). The provisions of the INA concerning detention and bond thus provide no indication that Congress's plan was to "provide[] an independent cause of action" or create an "alternative review procedure" for claims challenging detention review procedures, *Citizens for Resp. & Ethics in Wash.*, 846 F.3d at 1245 (internal quotation marks omitted).

* * *

The text, history, and structure of the APA all demonstrate that Congress wrote § 704 only to preclude APA review in those cases where Congress had provided a special statutory procedure for review of a specific type of agency action and that special statutory procedure provided an "adequate" remedy. Section 2241 is not one of those procedures, and there is no evidence in the immigration laws that Congress intended habeas corpus to be the exclusive remedy or vehicle for review of immigration detention bond hearing procedures. This court should thus reject the government's argument that L.M.U. cannot maintain this APA lawsuit based on the "other adequate remedy in a court" provision of § 704.

CONCLUSION

For the foregoing reasons, this court should deny defendants' motion to dismiss.

Dated: June 22, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2021, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: June 22, 2021

/s/ David H. Gans
David H. Gans