No. 15-1204

IN THE

Supreme Court of the United States

DAVID JENNINGS, *et al.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Of Counsel:
JEFFREY L. BLEICH
IAN R. BARKER
PETER Z. STOCKBURGER
BENJAMIN P. HARBUCK
ANDREW M. LEGOLVAN
DENTONS US LLP

LINDA A. KLEIN
Counsel of Record
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654
(312) 988-5000
abapresident@americanbar.org

Counsel for Amicus Curiae
American Bar Association

268802

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF THE AMERICAN BAR ASSOCIATION

Pursuant to this Court's Rule 37.3, amicus curiae American Bar Association ("ABA") respectfully submits this brief recommending that this Court affirm the determination below that, to ensure the Government's compliance with the Immigration and Nationality Act and the Due Process Clause of the Fifth Amendment to the Constitution, persons subject to detention under §§ 1225(b), 1226(c), or 1226(a) of Title 8 of the United States Code must be afforded individualized bond hearings after they have been detained for a prolonged period to determine whether they present a danger or flight risk, and that such hearings must occur periodically thereafter where detention continues.[1]

STATEMENT OF INTEREST

The ABA respectfully submits this brief as amicus curiae pursuant to Rule 37.3 of the Rules of this Court. The ABA is a voluntary, national membership organization of the legal profession. Its more than 400,000 members, from each state and territory and the District of

1. This brief is filed with the consent of both petitioners and respondents, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to the Court's Rule 37.6, the ABA states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than the ABA, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it reflects the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption of the positions in this brief or reviewed the brief prior to filing.

Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer associates in allied fields.

The ABA is committed to protecting the constitutional and statutory rights of immigrant detainees. Since 1990, the ABA House of Delegates has maintained support for facilitating the exercise of the right to counsel; for detaining noncitizens only in extraordinary circumstances and only in the least restrictive environment necessary; and for considering alternative means of ensuring appearance at immigration proceedings. In August 2002, the ABA reaffirmed its commitment to these principles in a resolution adopted by the House of Delegates calling for the provision of prompt custody hearings for immigrant detainees before immigration judges, accompanied by meaningful administrative review and judicial oversight.

These principles are also reflected in the ABA's strong support for procedural safeguards in the criminal justice context, where the ABA has long been active. Among its most recent efforts, the ABA House of Delegates promulgated the latest edition of its Criminal Justice Standards on Pretrial Release (hereinafter "Pretrial Release Standards"), which represents a consensus of the legal community and contains a comprehensive set of guidelines intended to help promote fairness and balance in the criminal justice system. ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf. The first edition of the Pretrial Release Standards was described by former Chief Justice

Burger as the "single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974), *quoted in* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10, 10 (2009).

These Pretrial Release Standards are guided by the recognition that deprivation of an individual's liberty while awaiting a final determination of his or her fate is "harsh and oppressive, subjects [individuals] to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support." Pretrial Release Standards, 10-1.1. While the Pretrial Release Standards are addressed principally to criminal detention, the ABA believes that procedural safeguards are also critical where, as here, immigrants are awaiting a civil proceeding—often housed in criminal detention facilities[2]—to determine whether or not they may be removed from this country.

In 2006, the ABA House of Delegates adopted a resolution opposing the detention of immigrants in removal proceedings except in extraordinary circumstances, which would require a specific determination of a threat

2. United States Immigration and Customs Enforcement ("ICE") uses hundreds of facilities for immigration detention, the majority of which are state and local jails and correctional institutions where ICE contracts for bed space. This creates the anomaly of civil administrative detainees incarcerated alongside criminal defendants and inmates serving criminal sentences but without any of the procedural safeguards that are the norm in the criminal justice context.

to national security, another person, or public safety, or that the immigrant presents a substantial flight risk. *See* ABA Report 107E, adopted February 2006 (hereinafter "Report 107E"), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2006_my_107e.authcheckdam.pdf. Additionally, the ABA recommended in Report 107E that ICE implement alternatives to detention to ensure that immigrants appear in court; develop a process for appeals of ICE officers' determination of whether immigrants may be released from detention; and establish mechanisms to ensure full compliance with the law regarding post-order custody review and proper administrative review and judicial oversight of all detention cases. *Id.*

Most recently, in 2012, the ABA House of Delegates approved the ABA Civil Immigration Detention Standards ("Detention Standards"). *See* ABA Civ. Immigr. Det. Standards, 12A102, adopted August 2012, as amended in August 2014 by Res. 111, *available at* http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf. These describe guiding principles for immigration detention, consistent with due process and principles of justice and fairness. They include that restrictions or conditions placed on immigrants should be non-punitive and the least restrictive means required to further the goals of ensuring the appearance of the immigrant in immigration court or effectuating removal. Detention Standards, § VII.C. To that end, the Detention Standards recommend requiring both prompt initial and continuing periodic objective determinations that the immigrant either presents a threat to national security or public safety, or that the immigrant presents a substantial flight risk that cannot

be mitigated through parole, bond, or a less restrictive form of custody or supervision. *See* Detention Standards, § II.C. The Detention Standards further encourage ICE to review detention placements regularly to ensure that individuals are detained for the minimum time necessary and are not detained indefinitely. Detention Standards, § III.D.

In addition to promulgating effective standards for immigration detention, the ABA has an extensive history of appearing as amicus curiae in immigration- and detention-related cases before this Court, including in the following cases: *Arizona v. United States*, 567 U.S. __, 132 S. Ct. 2492 (2012); *Benitez v. Mata*, 540 U.S. 1147 (2004); *Demore v. Kim*, 538 U.S. 510 (2001); *Calcano-Martinez v. INS*, 533 U.S. 348 (2001); *Reno v. Flores*, 507 U.S. 292 (1993); *United States v. Salerno*, 481 U.S. 739 (1987); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991); *INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183 (1991); and *Reno v. Arab-Am. Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

The ABA appears as amicus curiae in this proceeding because the questions presented have serious implications for the fair administration of justice and, in particular, for the constitutional and statutory rights of respondents to a timely determination of the reasonableness of their detention. Because these constitutional and legal questions are significant and substantially impact the legal justice system—in which the ABA maintains a fundamental interest—the ABA respectfully submits this brief.

SUMMARY OF ARGUMENT

The ABA submits this amicus brief for the limited purpose of describing its experience and that of the federal courts regarding efforts to protect immigrant detainees from unconstitutionally prolonged detention, and why this experience supports the Court of Appeals' determination to interpret the relevant statutes as fixing a time limit by which hearings must be conducted. The ABA agrees with the Court of Appeals that the status quo of relying on immigrants to challenge their detention period case-by-case—typically through habeas petitions—has led to serious due process problems. Many immigrants have been detained for years under 8 U.S.C. §§ 1225(b), 1226(c), or 1226(a) without a bond hearing to determine the lawfulness of their detention. The Court of Appeals' approach of interpreting the statutes to include a time limit by which the Government must conduct such hearings after the immigrant is first detained best avoids detention that violates an immigrant's due process rights. Decades of experience with individual cases in the Ninth Circuit have confirmed that—absent a temporal limit—the Government has not provided immigrants a timely hearing on whether their continued confinement was justified based on flight risk and danger.

Because due process protections apply to immigration detention, the Government must, within a reasonable time, justify continued confinement. Specifically, it must show, at a hearing before a neutral decision maker, that the particular detainee presents a sufficient risk of danger or flight to outweigh their constitutionally protected liberty interests. Where, as here, Congress does not expressly provide the specific timing and method by which

detained immigrants can test the legal basis for their detention, the canon of constitutional avoidance requires the Court to construe the applicable statutes to provide some means of testing whether detention is justified. Under the doctrine of constitutional avoidance, the Court interprets an ambiguous statute in a manner that avoids serious constitutional problems. Where Congress does not expressly set a time limit or establish a procedure for the Government to justify continued detention, the courts must construe the statutes in a manner that ensures compliance with the Constitution's due process requirements.

The Court of Appeals correctly determined that the rules of statutory construction, as informed by the Due Process Clause and prior case law, require that a hearing be granted to respondents within six months of their detention to determine whether they present a danger or a flight risk. The extensive history of these proceedings confirms that, absent such a deadline for the Government to conduct a hearing, individuals who may well be entitled to release are confined to languish in prison-like conditions for years. The Due Process Clause requires a bright-line rule fixing the period by which the Government must demonstrate at a bond hearing that continued detention is required because of an issue of safety or because the detainee presents an ongoing flight risk.

The case-by-case approach for evaluating the reasonableness of an immigrant's detention has resulted in unreasonably long and unpredictable detentions in the circuits that have adopted this kind of rule. These decisions typically depend more on the detention location and docket size of the court rather than on any consistent set of principles.

This Court has previously approved a bright-line rule for assessing when detention of individuals with final orders becomes presumptively unreasonable, and has also approved bright-line rules in other contexts. *Zadvydas v. Davis,* 533 U.S. 678, 699-701 (2001); *Clark v. Martinez*, 543 U.S. 371, 386 (2005); *see e.g.*, *Cheff v. Schnackenberg*, 384 U.S. 373, 380-81 (1966) ("*Schnackenberg*") (plurality opinion). The ABA thus urges this Court to affirm the use of a bright-line rule here to require bond hearings whenever detention under the relevant statutes exceeds a specific timeframe, and conduct periodic bond hearings thereafter. Such bright-line rules "provide some degree of certainty" and "articulate more clearly the boundaries of what is permissible" under the Constitution. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) ("*McLaughlin*") (announcing bright-line presumption that probable cause hearing within 48 hours is generally timely under the Fourth Amendment).

Finally, the Government does not meet its due process obligations by requiring detainees to file petitions for habeas corpus following their unduly lengthy confinement. Due process rights and the habeas privilege are distinct. Indeed, this Court has held that due process requires an administrative hearing to test detention without regard to whether a habeas remedy is also available. Even apart from the objectively inconsistent outcomes resulting from the case-by-case habeas approach, habeas procedures are particularly ill-suited to these circumstances for three reasons. First, ABA practitioners' experience as well as court data confirm that requiring detained immigrants to initiate habeas proceedings dramatically reduces their ability to obtain relief, because they rarely have access to counsel to navigate complex habeas procedures. Ingrid

V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court,* 164 U. Pa. L. Rev. 1, 32 (2015) (showing that only 14% of detained immigrants were represented by counsel). Second, because detainees cannot file habeas petitions until their claims are ripe, immigrants must wait until their detention has already become unreasonable before even beginning the lengthy habeas process—thus further compounding the delay. Lastly, as the lower courts have themselves made clear, reliance on federal courts with crowded dockets necessarily prolongs detention, given the numbers of detainees and the cumbersome nature of habeas proceedings.

Absent a bright-line rule requiring a hearing before an immigration judge automatically after a fixed period of time, both Government officials and federal courts will be required to speculate regarding the point at which any immigrant's detention has likely become unreasonable. In *Demore*, a member of the Court's majority observed that an immigrant "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). Current U.S. Department of Justice Executive Office of Immigration Review ("EOIR") statistics reveal that, in the thirteen years since *Demore*, thousands of immigrants have been subjected to detention for years, without any determination that they presented a danger or flight risk. *See* EOIR, Certain Criminal Charge Completion Statistics (2016), *available at* https://www.justice.gov/sites/default/files/pages/attachments/2016/08/25/criminal-charge-completion-statistics-201608.pdf (showing thousands of detainee removal cases that lasted over 24 months from receipt

to initial case completion/decision, including in the period from 2003 to 2015). The Government has thus proved incapable of safeguarding detained immigrants' constitutional and statutory rights absent court-mandated, easily applied procedures. The experience of ABA practitioners, current EOIR statistics, the record below and the documented experience of prolonged detainees in other circuits all confirm that the concern expressed in the *Demore* concurrence is indeed reality. Thus, this Court should uphold the Ninth Circuit's ruling establishing a bright-line temporal limit on detention, after which time the Government must provide detainees with a bond hearing to determine if their continued detention is warranted by danger or flight risk and must provide periodic hearings thereafter.

ARGUMENT

I. To Avoid Serious Due Process Concerns, The Immigration Detention Statutes At Issue Must Be Read To Require A Hearing To Justify Detention Within A Reasonable Period

The ABA will not repeat issues more thoroughly addressed by the parties and the Court of Appeals below. The ABA notes that the Government does not appear to dispute that immigrants detained pursuant to 8 U.S.C. §§ 1225(b), 1226(c) and 1226(a) are entitled to due process protections. *See, e.g.*, Petr. Br. at 29, 47. This Court held that immigrants are entitled to freedom from excessive detention in *Zadvydas*, 533 U.S. at 690-96 ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"). In enacting

these three statutes, however, Congress did not identify a mechanism for securing those rights. Although each of the statutes contains different provisions directed at different categories of immigrants, none expressly state the manner in which an individual may vindicate the constitutional right to an individualized hearing before a neutral decision maker to test the reasonableness of prolonged detention. The canon of constitutional avoidance requires therefore that the courts interpret the statutes to allow a workable means of conducting such a hearing, because to interpret the statutes otherwise "would raise serious constitutional problems." *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *see also Zadvydas*, 533 U.S. at 695 (employing the constitutional avoidance canon in interpreting 8 U.S.C. § 1231(a)(6)). As set forth below, the means employed by the Court of Appeals—though less stringent than those recommended and adopted by the ABA—adequately secure those rights by ensuring administrative review with clear standards within a fixed period of time. By contrast, ABA practitioners' and federal courts' experience has demonstrated that the case-by-case habeas petitions immigrants would be forced to file under the Government's interpretation would not adequately secure the important rights at stake here.

II. A Temporal Bright-Line Rule Is Necessary And Appropriate To Provide Uniformity And Clear Instruction On When The Government Must Conduct A Bond Hearing

To ensure that immigrants subject to prolonged detention pending removal proceedings may test the basis for their detention, the Ninth Circuit appropriately adopted a bright-line temporal approach, providing a clear

and consistent mechanism for such determinations. The bright-line approach is consistent with the ABA Detention Standards and related policies, which call for a prompt detention determination based on objective findings that the immigrant presents a danger to the community or a substantial flight risk.[3] These standards further provide that such review should take place within a set period of time and be regularly reviewed thereafter.[4]

A bright-line approach most appropriately ensures compliance with due process obligations and addresses the well-founded concerns of ABA members with the case-by-base approach—particularly that it produces needlessly prolonged detention periods and has caused inconsistent application of the law, resulting in arbitrary detention

3. Report 107E (showing that the ABA supports "a prompt hearing" before an immigration judge for immigrants denied release, "including meaningful administrative review and judicial oversight"); Detention Standards, § II.G ("A noncitizen should only be detained based upon an objective determination that he or she presents a threat to national security or public safety or a substantial flight risk that cannot be mitigated through parole, bond, or a less restrictive form of custody or supervision.").

4. Detention Standards, § III.A(1) ("The intake, classification, and placement process should be used by DHS/ICE to determine whether a noncitizen should be released, placed in an alternative-to-detention (ATD) program or detained."); *id.* at § III.D ("In addition to assessing individuals in the initial intake process, DHS/ICE should regularly review its placement and classification decisions to ensure that residents are (a) Detained for the minimum time necessary; (b) Not detained indefinitely; (c) Reclassified and, if appropriate, transferred to another kind of facility; and (d) Released if detention is no longer appropriate. The initial review of a resident's classification and placement should be performed no more than four weeks after a resident has entered a facility.").

determinations.[5] By contrast, the bright-line approach similar to the one adopted by this Court in *Zadvydas* and *Clark*, and as adopted by the Ninth Circuit, is better suited to achieve due process requirements, and is consistent with this Court's precedent.

Jurisdictions that have applied a case-by-case, multifactor test have experienced inconsistent and irreconcilable results that compound, rather than resolve, due process concerns. By contrast, the experience of lower courts and this Court in analogous contexts has demonstrated that a bright-line temporal rule is easier to administer and monitor, and gives both the Government and the immigrant fair opportunity to be heard by an administrative officer with appropriate expertise.

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5. In addition to preventing arbitrary detention, a bright-line rule helps prevent the normalization of prolonged detention, which itself compounds delays by producing institutional apathy. *See* Institute of Judicial Administration, American Bar Association, Juvenile Justice Standards: Standards Relating to Interim Status 12 (1979) (recognizing that delay in juvenile courts "tend[s] to institutionalize and legitimate the unwarranted detention that already exists") (citing Patricia Wald, *Pretrial Detention for Juveniles*, in PURSUING JUSTICE FOR THE CHILD 119, 126-27 (Margaret K. Rosenheim ed., 1976)), *available at* http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/JJ_Standards_Interim_Status.authcheckdam.pdf. Indeed, administrators often favor a bright-line system because it compels them to address demands that would otherwise go unmet. *Id.* ("Deadlines and absolute bars to detention may seem arbitrary, yet it is striking how frequently detention personnel ask for such limitations, realizing that they cannot cope with an unending stream of detainees.") (quoting Wald, PURSUING JUSTICE FOR THE CHILD at 126-27).

A. Because The Case-By-Case Approach Gives Rise To Inconsistent Determinations, It Results In Arbitrary Detention

The ABA's position in this proceeding draws upon the actual experience of federal courts that have employed the case-by-case approach in habeas proceedings to test the reasonableness of immigrants' lengthy detention. In those situations, district courts have been instructed by their respective circuit courts to evaluate various factors, including: (1) the total length of detention; (2) the likely duration of future detention; (3) the likelihood that the proceedings will end in a final removal order; (4) whether any delay in the proceedings can be attributed to the Government or the immigrant; and (5) in the context of a criminal noncitizen, a comparison between the length and nature of the current detention and the detention in prison for the crime that rendered the immigrant removable.[6] If the immigrant prevails in the federal court on his habeas petition by demonstrating that the length of his detention was indeed unreasonable, he is then entitled to a bond hearing by an immigration judge to determine whether he nonetheless poses a flight risk or danger to the community.

The standard of "reasonableness" as determined by these factors provides no uniform guidance as to when a bond hearing is required. Because of the systemic problem of prolonged detention, challenges to detention have repeatedly arisen in the federal courts, requiring them

6. *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1217-19 (11th Cir. 2016); *Reid v. Donelan*, 819 F.3d 486, 500 (1st Cir. 2016); *see also* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Detention*, 65 Hastings L.J. 363, 396-98 (2014) (listing factors courts consider to determine "reasonableness" of detention).

to determine when detention has become "unreasonable." Not surprisingly, this has led to widespread confusion and inconsistent application. *See Lora v. Shanahan*, 804 F.3d 601, 615 (2nd Cir. 2015) (compiling cases of inconsistent determinations of reasonableness and concluding "the pervasive inconsistency and confusion exhibited by district courts in this Circuit when asked to apply a reasonableness test on a case-by-case basis weighs, in our view, in favor of adopting an approach that affords more certainty and predictability"); *Reid*, 819 F.3d at 497 ("the approach has resulted in wildly inconsistent determinations"); *Sopo v. U.S. Attorney Gen.,* 825 F.3d 1199, 1226 (11th Cir. 2016) (Pryor, J., concurring in part and dissenting in part) ("despite the best efforts of judges, courts have been unable to apply flexible reasonableness standards in a manner that generates predictable, consistent, and fair outcomes"); Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Detention*, 65 Hastings L.J. 363, 395-400 (2014) (analyzing the disparate application of reasonableness factors in district courts).[7]

Additionally, under this approach, courts have expressly expanded the "reasonable" period for detention to accommodate the size of their immigration dockets. *See Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir. 2003) ("A

7. A survey of district courts' habeas decisions reveals disparate handling of a number of factual determinations bearing on reasonableness, including: (i) the effect of applications or appeals the immigrant files in good faith, Anello, 65 Hastings L.J. at 398-99 nn. 193-94, (ii) the effect of administrative appeals by the Government, *id.* at 399-400 nn. 196-201, (iii) the relevance of the expected duration of future detention, *id.* at 400 nn. 202-03, and (iv) the relevance of the immigrant's likelihood of success in removal proceedings, *id.* at 400-01 nn. 204-07.

bright-line time limitation, as imposed in *Zadvydas*, would not be appropriate for the pre-removal period; hearing schedules and other proceedings must have leeway for expansion or contraction as the necessities of the case and the immigration judge's caseload warrant."); *see also Lora*, 804 F.3d at 615-16 ("[W]hile a case-by-case approach might be workable in circuits with comparatively small immigration dockets, the Second and Ninth Circuits have been disproportionately burdened by a surge in immigration appeals and a corresponding surge in the sizes of their immigration dockets."); *Reid*, 819 F.3d at 498 ("Moreover, the federal courts' involvement is wastefully duplicative. . . . This inefficient use of time, effort, and resources could be especially burdensome in jurisdictions with large immigration dockets."). The constitutional reasonableness of spending a year or more in an immigration detention facility, without being deemed dangerous or a flight risk, cannot depend on the location of the detention or the caseload of any particular judge. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that due process requires that "the nature and duration of commitment bear some reasonable relation to the purpose").

Some federal courts applying these factors have gone so far as to deem routine extensions, such as to pursue appeals or seek relief from other agencies, to be grounds to deny habeas relief. Anello, 65 Hastings L.J. at 399 n.194 (collecting cases). Penalizing an immigrant for his attorney's need for additional time to prepare or to pursue other meritorious relief offends ABA policies promoting the right to effective assistance of counsel. *See* ABA Model Rules of Professional Conduct, Rule 1.1 ("Competent representation requires the . . .

thoroughness and preparation reasonably necessary for the representation."); *see also id.*, Rule 1.3 cmt. 1 ("A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.").

To add even further uncertainty, unpredictability, and inconsistency, the circuits have noted that the factors articulated are not exhaustive and that there may be "other factors that bear on the reasonableness of categorical detention." *Reid*, 819 F.3d at 501; *Sopo*, 825 F.3d at 1218. Without clarifying to some degree of certainty what constitutes "unreasonable detention," courts will continue to apply manifestly inconsistent, unpredictable, and seemingly arbitrary standards, *see* Anello, 65 Hastings L.J. at 398-401, depriving immigrants of the "'protection of the individual against arbitrary action of government,'" which this Court "ha[s] emphasized time and again [is] 'the touchstone of due process.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989) (unpredictability and inconsistency are "incompatible with the Rule of Law"); *Sopo*, 825 F.3d at 1225 (Pryor, J., concurring in part and dissenting in part) ("[T]he risk that the case-by-case approach will result in unpredictable, inconsistent, or arbitrary outcomes itself raises serious due process concerns") (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

In short, experience of the federal courts, like that of ABA practitioners, has confirmed that employing a case-by-case approach to test the reasonableness of immigration detention periods actually compounds,

rather than resolves, due process concerns. The need for consistency, certainty, and the fair administration of constitutional guarantees thus favors a bright-line rule that allows a Government official to determine with confidence whether a detainee is entitled to a bond hearing.[8] *Cf. McLaughlin*, 500 U.S. at 56 ("[I]t is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds."); *see Sopo*, 825 F.3d at 1226 (Pryor, J., concurring in part and dissenting in part) ("The clarity of [a six-month bright-line rule] would benefit not only detained aliens . . . , but also courts, which would not have to engage in a weighing of multiple factors merely to decide whether and when a hearing must be provided.").

B. The Court Has Recognized That Bright-Line Rules Best Protect Detainees' Constitutional Rights

Consistent with *Zadvydas* and *Clark*, this Court has favored bright-line rules when determining the constitutionality of the continued and prolonged detention of immigrants. In *Zadvydas*, applying the canon of constitutional avoidance to post-removal detention, this Court found it necessary "for the sake of uniform

8. The Government's concern that a bright-line rule will result in the filing of frivolous appeals or deliberately dilatory tactics is unwarranted. The immigration judge can always consider whether the strength of the detainee's claim or the detainee's litigation conduct affects the reasonableness of granting a bond. *See Sopo*, 825 F.3d at 1226-28 (Pryor, J., concurring in part and dissenting in part) (recognizing that "[u]nder the bright-line approach, criminal aliens are not automatically released after six months").

administration" to set a "presumptively reasonable period of detention" of six months. *Zadvydas*, 533 U.S. at 699-701. The Court found six months to be appropriate because "Congress previously doubted the constitutionality of detention for more than six months." *Id.* at 701 (adopting presumption that detention beyond six months constitutes an unreasonable period of post-removal detention of removable noncitizens) (citing Juris. Statement of United States in *United States v. Witkovich*, O. T. 1956, No. 295, pp. 8-9); *see Clark*, 543 U.S. at 386 (2005) (extending *Zadvydas* to inadmissible noncitizens).

In *Demore*, the Court rested its decision upholding mandatory detention of criminal noncitizens pending removal proceedings on the limited duration of the detention. *See Demore*, 538 U.S. at 513 (authorizing "that persons such as respondent be detained for the *brief period* necessary for their removal proceedings") (emphasis added); *see id.* at 526 ("[G]overnment may constitutionally detain deportable aliens during the *limited period* necessary for their removal proceedings") (emphasis added). One Justice in *Demore* noted that a detainee "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Id.* at 532 (Kennedy, J., concurring). The Court therefore left open whether the statute authorized prolonged mandatory detention.

In *Demore*, the Court assumed removal proceedings last, on average, "roughly a month and a half in the vast majority" and "about five months in the minority of cases in which the alien chooses to appeal." 538 U.S. at 530. In fact, the Government now acknowledges these assumptions were erroneous, and that a true analysis of

the data would have shown that, when there is an appeal, the immigrant spends an average of more than a *year* in detention—more than double what the Court assumed in *Demore*. Petr. Br. 34-35 n.10. Over a decade later, the Government has failed to decrease detention time, forcing a detainee pursuing relief to face a significant probability of spending a year or more in detention. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1072 (9th Cir. 2015). Despite the Government's failure to rectify the problem, the current process in place does little to ensure prolonged detention is met with a required bond hearing. Such categorical unreasonableness requires a *Zadvydas*-style categorical safeguard. *See Sopo*, 825 F.3d at 1230 (Pryor, J., concurring in part and dissenting in part).

A bright-line rule, as opposed to a case-by-case approach, would also be consistent with—and would meaningfully enforce—this Court's directive that, under the canon of constitutional avoidance, courts should apply a definite standard that avoids the serious constitutional problem altogether. *See Clark*, 543 U.S. at 384 (noting that the Court is not "free to 'interpret' statutes as becoming inoperative when they 'approach constitutional limits'"). Simply adopting a reasonableness standard, without definitive bright-line guidance, amounts to interpreting the statutes to "'authorize detention until it approaches constitutional limits,'" precisely the approach this Court rejected in *Clark*. *Id.*

Even outside the context of Due Process Clause requirements, this Court has implemented temporal bright-line rules and presumptions to limit the need for judicial oversight and to ensure government officials act within constitutional limits. *See McLaughlin*, 500 U.S. at

56 (creating a presumption that a probable cause hearing within 48 hours of arrest will generally comply with the Fourth Amendment); *Schnackenberg*, 384 U.S. at 380 (interpreting the Sixth Amendment to require a jury trial where more than six months of imprisonment is imposed).

In *McLaughlin*, the Court found it necessary to clarify a previous holding that the Fourth Amendment requires a "prompt" judicial determination of probable cause as a prerequisite to further pretrial detention after a warrantless arrest. *McLaughlin*, 500 U.S. at 47 (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)). The Court recognized that its previous standard was too "vague" to be effective because it failed to provide "sufficient guidance" to enforce the Fourth Amendment, resulting in "systemic challenges," and, in turn, requiring federal judges to "oversee[] local jailhouse operations." *Id.* at 55-56 ("Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds."). Therefore, relying on processing-time data from the Court of Appeals, the Court held that 48 hours is the presumptive time limit for a probable cause hearing. *Id.* at 56-57; *accord Schnackenberg*, 384 U.S. at 380 (holding bright-line six-month sentence rule was required for "effective administration" of the "petty offense" exception to the constitutional right to jury trial).[9]

9. The dissent in *Zadvydas* suggested that the six-month rule in *Schnackenberg* was only "proper 'under the peculiar power of the federal courts to revise sentences in contempt cases.'" *Zadvydas*, 533 U.S. at 712 (Kennedy, J. dissenting) (quoting *Schnackenberg*, 384 U.S. at 380). Since *Schnackenberg*, however, the Court has held the right to jury trial applies to the states through the Fourteenth

Similar to the vague standards of "promptness" in *McLaughlin* and "petty offense" in *Schnackenberg*, a "reasonableness" standard for detentions under the statutes at issue without a bright-line rule fails to identify when a bond hearing is constitutionally required. As demonstrated by the record before this Court, a reasonableness standard results in ineffective administration of constitutional rights, and inconsistent, unpredictable, and arbitrary detention determinations. The lower courts and the ABA both recognize the need and appropriateness of a bright-line rule, and such a rule would be consistent with due process and this Court's precedent. The Government has been unable to resolve the problem of prolonged detention, and a multifactor reasonableness test will do little to guide the Government's compliance with its due process obligations. Therefore, the ABA urges this Court to adopt a bright-line temporal rule for when immigration officials must afford a bond hearing on flight risk and dangerousness.

III. Possible Habeas Relief Does Not Ameliorate The Government's Due Process Violations

The Government acknowledges that the Due Process Clause imposes some temporal limit on detention: "[B]ecause longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends

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Amendment, *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968), and later applied the same six-month rule to *state courts*, *Baldwin v. New York*, 399 U.S. 66, 73-74 (1970), over which federal courts have no supervisory power to revise sentences. Therefore, as applied to the states, the six-month rule embodies the Court's broader authority to set bright-line rules for effective enforcement of constitutional rights.

more closely." Petr. Br. at 47 (citing *Zadvydas*, 533 U.S. at 690, 701). Having failed over several years to ensure that detention of immigrants does not extend for an unwarranted period, the Government now proposes to use individual habeas claims as a means to test the reasonableness of the period of detention. *Id.* Although the Government asserts unconstitutional applications of the statutes are rare and could be addressed through habeas proceedings (*see* Petr. Br. at 12, 14), neither the actual experience of courts nor the practical realities of habeas procedure suggest that such cases are rare, or that the habeas procedure provides an adequate substitute for a timely bond hearing before an administrative hearing officer. Indeed, the experience of ABA member practitioners has been that the only way to ensure fair and timely review is through "a prompt hearing before an Immigration Judge for any alien in removal proceedings who is denied release with or without bond, including meaningful administrative review and judicial oversight." Report 107E at p. 1.

A. Government Administrative Proceedings Must Afford Due Process Regardless Of Whether Habeas Is Also Available

This Court has already recognized that, even where federal habeas corpus is available, administrative processes must still safeguard due process rights. For example, in the context of civil commitment, this Court has held that due process requires an administrative process to protect against unreasonable detention, notwithstanding the availability of habeas review to challenge such civil commitment. *See, e.g.*, *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245, 257 (1972) ("It is

elementary that there is a denial of due process when a person is committed or, as here, held without a hearing and opportunity to be heard."); *Jackson*, 406 U.S. at 738 ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."); *Parham v. J.R.*, 442 U.S. 584, 608-17 (1979); *see Duncan v. Walker*, 533 U.S. 167, 176 (2001) (observing "federal habeas corpus review may be available to challenge the legality of a state court order of civil commitment").

Most recently, in the context of scrutinizing the purpose and duration of detaining enemy combatants, this Court directed use of proceedings with full due process rights, despite the fact that habeas proceedings remained available. Thus, in cases relating to detention at Guantanamo, the Court required an improved set of due process protections in military trials, notwithstanding the availability of the writ of habeas corpus to determine the availability of constitutional protections for these detainees. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (acknowledging that the Due Process Clause "informs the procedural contours of [habeas corpus] in this instance," but nonetheless setting forth requirements for hearings separate and apart from habeas, even though "[a]ll agree suspension of the writ has not occurred here"); *cf. Boumediene v. Bush*, 553 U.S. 723, 785 (2008) (holding that habeas must remain available even if detentions satisfy due process requirements); *see also Habeas Corpus and Due Process*, Brandon L. Garrett, 98 Cornell L. Rev. 47, 54 (2012) (discussing the "longstanding and consistent treatment of habeas process as independent of due process"); Lee Kovarsky, *Custodial and Collateral Process: A Response to Professor Garrett*, 98 Cornell L. Rev. Online 1, 1 (2013).

Following this Court's lead, the circuits have recognized that habeas review "is in no way the type of periodic review that due process requires." *J.R. v. Hansen*, 803 F.3d 1315, 1326 (11th Cir. 2015) ("Habeas can be at most a backstop—a failsafe mechanism, not the sole process available.") (citations omitted); *Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981) ("No matter how elaborate and accurate the habeas corpus proceedings . . . may be once undertaken, their protection is illusory when a large segment of the protected class cannot realistically be expected to set the proceedings into motion in the first place. . . . [¶] The bare existence of optional habeas corpus review does not, of itself, alleviate due process concerns.").

B. Habeas Has Proved To Be An Ineffective Remedy

Even if, in some contexts, a habeas proceeding could theoretically satisfy the Due Process Clause, an alternative procedure is required where, as here, habeas does not afford effective due process for a substantial number of detainees.

Habeas has proved inadequate as a practical matter for a number of reasons. As discussed above, the case-by-case "reasonableness" factors that courts apply in habeas review are nonexclusive and, when applied in isolation, different courts have produced wildly inconsistent, unpredictable, and seemingly arbitrary applications. *See* Section II.A *supra*. Apart from the arbitrariness inherent in case-by-case determinations, in the ABA's experience, the federal habeas process is inherently ill-suited to prevent immigrants from suffering unreasonably prolonged detention. First, the ABA's experience

and federal court data confirm that the complexity of habeas presents an insurmountable barrier to many detained immigrants, who would effectively be denied any opportunity for review. Second, habeas procedures inevitably compound—rather than relieve—the period of prolonged detention. Third, these petitions consistently languish on crowded federal court dockets due in part to the fact that virtually all expertise about the nature and purpose of confinement reside with administrative officials, leading courts themselves to question their current role in the process.

As a preliminary matter, requiring a habeas petition in federal court creates nearly insurmountable hurdles for the detained immigrant. An unrepresented detainee unfamiliar with the American legal system and who may not speak the language is poorly situated to navigate the complicated procedures of a habeas petition. *Reid*, 819 F.3d at 498 ("federal habeas litigation itself is both complicated and time-consuming, especially for aliens who may not be represented by counsel"); *Lora*, 804 F.3d at 615 ("Adopting a six-month rule . . . avoids the random outcomes resulting from individual habeas litigation in which some detainees are represented by counsel and some are not, and some habeas petitions are adjudicated in months and others are not adjudicated for years."); *Sopo*, 825 F.3d at 1226 (Pryor, J., concurring in part and dissenting in part) ("[C]larity and predictability is particularly critical in the immigration context, where detainees frequently lack knowledge of the American court system; the resources, financial and otherwise, to obtain an attorney; and the language skills required to navigate the legal thicket.") (internal quotations omitted).

Detained immigrants also lack meaningful access to legal assistance while confined. Based on its members' experience in this context, the ABA has observed that special efforts are required for immigrants even to "be able to meet with current or prospective legal representatives and other legal personnel." Detention Standards, § VII.A(1). From 2007 through 2012, in approximately 1.2 million removal cases, only 14% of detained immigrants were represented by counsel, compared to 66% of non-detained immigrants. Ingrid V. Eagly & Steven Shafer, 164 U. Pa. L. Rev. at 32; *see also* EOIR Yearbook 2015, at E3 ("Many individuals who appear before EOIR are indigent and cannot afford a private attorney."). Under the Government's approach, the vast numbers of immigrants who do not or cannot file habeas petitions because of the real and daunting challenges facing detained immigrants—whether in the form of language barriers, literacy barriers, lack of access to legal resources, or otherwise—will be denied their due process rights altogether.

The Government's approach also necessarily increases and compounds the period of prolonged detention among those already held beyond a reasonable period. Justiciability requirements can prevent immigrants from even starting the lengthy habeas process until after their detention has already become unreasonably prolonged, and may foreclose any relief entirely if the immigrant files too early. *Reid*, 819 F.3d at 498 ("[F]ederal courts are faced with a 'moving target' in such cases because petitioners presumably cannot challenge their detention until it becomes unreasonable, but, even if the petitioner prematurely lodges a challenge, the detention may become unreasonable during the pendency of the claim.") (citing

Diop v. ICE/Homeland Sec., 656 F.3d 221, 227 (3d Cir. 2011)). Thus, a petition may not properly be initiated until after the detention has exceeded reasonable limits, and, even if successful, merely initiates the administrative procedure for review of the reasonableness of detention that the Government should have provided long before.

Once filed, a federal court's case-by-case analysis of the overly complex reasonableness factors drains significant time and resources, translating into further prolonged detention. Experience operating under habeas-based regimes shows that such cases are lengthy, and add significantly to already unreasonably prolonged detentions. *See*, *e.g.*, *Khalafala v. Kane*, 836 F. Supp. 2d 944, 947 (D. Ariz. 2011) (showing approximately two years and ten months from filing of habeas petition to district court decision adopting magistrate judge's recommendation); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 945 (9th Cir. 2008) (two years from filing to district court's decision); *see also* Amicus Brief of Americans for Immigrant Justice, et al., in Support of Respondents, Argument, § III.B (detailing how, after this Court's decision in *Demore*, the mean decision time for a prolonged detention habeas case was nearly 19 months in the Eleventh Circuit, over seven and a half months in the First Circuit, and almost 14 months in the Sixth Circuit). Moreover, the prevalence of judicial emergencies in federal courts presiding over immigration detention centers confirms that immigrant habeas petitions are not being timely heard. *Compare Detention Facility Locator*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/detention-facilities *with Judicial Emergencies*, United States Courts (showing correlation of judicial emergencies with concentrations of immigration detention

centers, including the Eastern District of Texas, which contains two detention centers and faces three judicial vacancies and 1,261 weighted filings per judgeship per year).

Indeed, the Sixth Circuit has raised "a question of institutional competence" in a system requiring that "federal courts undertake to supervise the reasonability of detention only via the habeas process." *See Ly*, 351 F.3d at 272. The court observed that immigration officials are "best situated to know which criminal aliens should be released, and federal courts are obviously less well situated to know how much time is required to bring a removal proceeding to conclusion." *Id.*

The unworkable habeas regime's inherent impediments to a timely bond hearing regarding flight risk and danger are incompatible with due process demands. The ABA has devoted decades to helping the courts provide "a fair and efficient immigration removal and detention system." Detention Standards, § II.E. Having studied the practical experience of courts and litigants, the ABA has overwhelmingly endorsed an administrative approach to safeguarding against unreasonable detention. To that end, the ABA has adopted standards—more strict than the Ninth Circuit's—calling for the Government to (i) initially assess whether an immigrant "should be released, placed in an alternative-to-detention (ATD) program or detained" (Detention Standards, § III.A(1).2); (ii) perform this initial assessment "no more than four weeks after a resident has entered a facility" (*id.* at § III.D); and (iii) "regularly review its placement and classification decisions to ensure that residents are . . . [d]etained for the minimum time necessary . . . and . . . [r]eleased if detention is no longer appropriate" (*id.*).

A requirement that immigration judges determine at a bond hearing held at a fixed point in time whether an immigrant is dangerous or presents a flight risk is an effective and efficient means of vindicating immigrants' due process rights. A periodic bond hearing requirement ensures that habeas fulfills its traditional role as a fail-safe—rather than the initial means—to prevent unlawful detention.[10]

The ABA in short concludes that the remedy proposed by the Court of Appeals falls within an appropriate range of remedies to address the constitutional problems posed by excessive detention of the immigrants in this case. In contrast, the Government's own figures confirm that it has systematically failed over decades to ensure timely review of the basis for immigrants' detention, notwithstanding the theoretical availability of habeas corpus. Accordingly, the ABA—whose members have wrestled with immigrant detention issues for decades—has concluded that an administrative bond proceeding conducted within some fixed time period to assess danger and flight risk is necessary to ensure fidelity to due process principles.

10. *See Boumediene*, 553 U.S. at 732, 777 (citing instances in which Congress provided habeas substitutes but still "preserve[d] habeas review as an avenue of last resort"); *Martin-Trigona v. Shiff*, 702 F.2d 380, 388 (2d Cir. 1983) (recognizing "[a] habeas corpus petition is the avenue of last resort, always available to safeguard the fundamental rights of persons wrongly incarcerated").

CONCLUSION

For the foregoing reasons, amicus ABA urges the Court to affirm the decision below.

Respectfully submitted,

Of Counsel:
JEFFREY L. BLEICH
IAN R. BARKER
PETER Z. STOCKBURGER
BENJAMIN P. HARBUCK
ANDREW M. LEGOLVAN
DENTONS US LLP

LINDA A. KLEIN
Counsel of Record
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654
(312) 988-5000
abapresident@americanbar.org

Counsel for Amicus Curiae
American Bar Association