No. 15-1204

IN THE

Supreme Court of the United States

DAVID JENNINGS, *et al.*,
Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,
Respondents.

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

RESPONDENTS' SUPPLEMENTAL REPLY BRIEF

MARK H. HADDAD
SEAN A. COMMONS
SIDLEY AUSTIN LLP
555 West Fifth Street
Suite 4000
Los Angeles, CA 90013
(213) 896-6000

JUDY RABINOVITZ
MICHAEL K. T. TAN
CECILLIA D. WANG
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2618

AHILAN T. ARULANANTHAM*
MICHAEL KAUFMAN
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017
(213) 977-5211
aarulanantham@aclusocal.org

JAYASHRI SRIKANTIAH
STANFORD LAW SCHOOL IMMIGRANTS' RIGHTS CLINIC
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-2442

Counsel for Respondents

* Counsel of Record

February 21, 2017

[Additional Counsel on Inside Cover]

DAVID D. COLE
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
915 15th Street, NW
Washington, DC 20005
(202) 544-1681

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—continued

INTRODUCTION

Prior to the injunction, the Government incarcerated thousands of people for years pending completion of removal proceedings without providing them custody hearings before neutral decision makers. Many of these individuals presented no flight risk or danger requiring detention, rendering their extended imprisonment pointless. Many of them also won their deportation cases. Some who lost did so only because they had to litigate their cases while detained. Others abandoned meritorious cases because they could not endure prolonged incarceration.

This regime, documented extensively below, did not protect individual liberty as required by the Due Process Clause and this Court's precedents concerning closely analogous forms of civil detention. This Court's immigration detention cases do not support the wholesale abandonment of basic due process requirements, including a custody hearing when detention becomes prolonged.

The Arriving Subclass (1225(b)) is entitled to that basic due process protection because, unlike those turned away at the border, they have passed the initial screening that Congress provided and are entitled by statute to establish their right of entry in full removal proceedings. Because the Government may not expel them unless and until it establishes their removability at the completion of their cases, it must afford them some minimal process to prevent prolonged arbitrary detention.

The Mandatory Subclass (1226(c)) warrants the same protection because they have not lost the right to reside here and, unlike the detainee in *Demore* v.

Kim, 538 U.S. 510 (2003), have challenged their incarceration without a hearing because it is prolonged.

Contrary to Petitioners' claims, the relief ordered below is modest and tailored to the immigration context. It does not require the release of any detainee. It requires only that a neutral decision maker conduct a fair hearing after six months of incarceration—the time limit for punishment without jury trial in criminal cases—to determine whether continued detention is needed to serve a valid purpose. Due process requires such hearings *within days* for people charged with crimes.

Placing the burden on the Government to show an individual need for continued incarceration is appropriate when detention becomes prolonged, *i.e.*, after six months of detention based only on the statute's categorical presumption. Immigration Judges (IJs) can then consider the likelihood of success on the merits, allegations of dilatory conduct, and other factors in assessing whether further incarceration is warranted to prevent flight or danger.

Petitioners assert that detainees can avoid prolonged detention "simply by returning to their native lands." P.Supp. 3. That alternative is unreasonable for the Arriving Subclass members fleeing persecution, nearly two-thirds of whom eventually satisfied Congress's standards for asylum even before the injunction. It is equally unreasonable for Mandatory Subclass members, nearly 40% of whom won their cases, often because they were brought here as children and have extensive family ties in this country. Petitioners point to other purported safeguards, like requests for parole or expedition, but the record establishes that these long-

available options have not prevented prolonged, purposeless detention.

Petitioners do not dispute that the risk of flight is often negligible when IJs order intensive supervision methods. According to Petitioners' own witness, appearance rates stand "at or near 100%." Nor do Petitioners cite the record to support their security concerns. Petitioners instead rely on extra-record sources and their own data analysis (not even that of their expert). Their new and untested representations are rife with error. They cite the wrong data, make calculations using materially-incomplete datasets, rely on policies that have not been implemented, and make other mistakes that invite error, just as in *Demore*.

Thus, although Petitioners claim the injunction places our nation at risk, the record below shows nothing of the sort. For over four years, the injunction has provided modest process for people not detained as national security threats without harming our interests. "Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint . . . ." *Boumediene* v. *Bush*, 553 U.S. 723, 797 (2008).

ARGUMENT

I. PROLONGED DETENTION UNDER SECTIONS 1225(b)(1)(B)(ii) AND 1225(b)(2)(A) WITHOUT AN INDIVIDUALIZED CUSTODY HEARING VIOLATES THE DUE PROCESS CLAUSE.

Petitioners now concede the Arriving Subclass is narrower than they previously argued. It includes only two groups of individuals, both of whom have satisfied the statutory requirements for full removal

proceedings. P.Supp. 10. Petitioners do not dispute that nearly two-thirds of these individuals win their cases. J.A. 125, tbl.38.

1. Nevertheless, Petitioners assert that providing hearings to such individuals after six months of detention has left our nation at risk. P.Supp. 24. The record belies this claim. The injunction has operated for over four years, yet the record contains no evidence that the release of Subclass members found to pose no flight risk or danger presents serious safety concerns.

Petitioners also ignore that, prior to the injunction, they already released some Arriving Subclass members on parole, P.Supp. 10-12, and released a far larger number of individuals—those who crossed the border without inspection—through bond hearings. R.Supp. at 5. The injunction requires only that those who present themselves at the border and are detained for six months receive a hearing before a neutral decision maker.[1]

No other system of civil detention permits the jailing authority to incarcerate people for months or years without hearings. Petitioners do not dispute this. They argue instead that detainees apprehended at the border have no right to liberty because they are "obviously inadmissible," P.Supp. 17, but that is not true of Arriving Subclass members. Most have shown a "significant possibility" of establishing eligibility for asylum, which will result in admission. R.Supp. 3-4. Others are lawful permanent residents (LPRs) or others found not "clearly and beyond a

---

[1] Contrary to Petitioners' claim, the detention of individuals screened in for full removal proceedings is governed by Section 1226(a), which places ultimate authority for interim release in the Attorney General, not the Secretary. Resp. 42-46.

doubt entitled to be admitted," but who still may be admissible. 8 U.S.C. 1225(b)(2)(A). All have a right to freedom from prolonged arbitrary detention while lawfully pursuing procedures Congress established to determine their admissibility. *See* R.Supp. 19-24.

2. Petitioners cite immigration cases from inapposite contexts to support their position that Subclass members have no right to liberty, P.Supp. 19-20, but, with the exception of *Mezei,* none addresses detention, let alone prolonged detention. Petitioners rely on *Kleindienst* v. *Mandel*, 408 U.S. 753, 756-59 (1972), and *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 275 (1990), both of which involved individuals physically outside the United States when alleged constitutional violations occurred. 494 U.S. at 264 ("[I]f there were a constitutional violation, it occurred solely in Mexico."). Petitioners contend Arriving Subclass members are, "in contemplation of law," entirely abroad, P.Supp. 20, but they cite no case adopting that view for people screened in for full removal proceedings, rather than for people denied visas, arrested abroad, or already ordered removed.

Galvan v. *Press*, 347 U.S. 522 (1954), and *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 581 (1952), address Congress's substantive power to create "[p]olicies pertaining to the entry of aliens and their right to remain." *Galvan*, 347 U.S. at 531; *Harisiades*, 342 U.S. at 587-89. They do not address the power to *detain* pending removal proceedings, let alone what procedural rights apply to prolonged detention. *Galvan* expressly recognized that "[i]n the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process." 347 U.S. at 531.

Similarly, *Ekiu* v. *United States*, 142 U.S. 651 (1892), established the uncontroversial proposition that the Government can deny admission to non-citizens. But this case is not about admission. *Ekiu*'s holding that there are no due process constraints on immigration enforcement was overruled in *Yamataya* v. *Fisher*, 189 U.S. 86, 100-01 (1903). *See* Amicus Br. of Professors of Constitutional, Immigration and Administrative Law 10.

Petitioners also cite *Landon* v. *Plasencia*, 459 U.S. 21 (1982), but it undermines their argument. *Plasencia* establishes that what process is due turns on the interests at stake, not whether an individual is apprehended at the border while seeking admission. *Id.* at 34. Here, Class members' interest is in avoiding prolonged arbitrary detention, not securing initial admission.

The only case Petitioners cite upholding detention is *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). Mezei was ordered excluded as a national security threat, however, and remained detained only because no country would accept him. *See* R.Supp. 20-24. This case involves individuals who have *not* been ordered removed, who are *not* national security threats, and who seek temporary release only if an IJ finds no flight risk or danger. Moreover, *Mezei* predates *Zadvydas*'s recognition of the distinction between the right to live "at large" in this country and the right to release from imprisonment under conditions of supervision. *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001). Respondents seek process only with respect to the latter.

3. Petitioners make separate arguments against custody hearings for Arriving Subclass members who are LPRs returning from brief travel abroad, but those arguments are foreclosed by *Plasencia*, 459 U.S.

at 34. Petitioners claim such individuals are "unusual," P.Supp. 24, but they are routinely detained based on prior convictions or for alleged unlawful conduct. *See* Amicus Br. of Detained Legal Service Providers 8-12 (documenting numerous cases). The record lacks more examples only because Petitioners failed to contest their existence in district court. Resp. 32.

Petitioners next assert that prolonged detention of returning LPRs without hearings would "virtually always be constitutional." P.Supp. 25-26. Petitioners describe a hypothetical LPR accused of smuggling drugs across the border as having no right to a custody hearing, but *Plasencia* involved analogous allegations and nonetheless required hearings that afforded due process even for admission, over which Congress has broader powers than detention. 459 U.S. at 34. Nor does *Demore* suggest otherwise. Even for brief detentions, *Demore* upheld mandatory detention for those who "became 'deportable' . . . only following criminal convictions that were secured following full procedural protections." 538 U.S. at 525 n.9. It does not support mandatory detention based on mere accusations.[2]

4. Petitioners also maintain the existing system provides sufficient process. P.Supp. 7-11. Safeguards at removal proceedings, however, address only whether Class members can live here permanently, not the justification for prolonged detention pending proceedings. Parole review also is insufficient, because it involves no hearing, no record, and no

---

[2] The parties agree returning LPRs with *convictions* triggering mandatory detention under Section 1226(c) have no greater rights than LPRs who did not travel; their rights are addressed in Point II.

appeal, and leaves the decision entirely in the jailer's hands. R.Supp. 24-27. *See also* Supp. Amicus Br. of Human Rights First 12-36.

Petitioners claim Class members can "simply return[] home." P.Supp. 13. That is not an option for asylum seekers fleeing persecution. And it is a misnomer for LPRs, many of whom have lived here since their youth. J.A. 556-58 (almost half of Class members arrived as children or young adults, over 60% have U.S. citizen children). Mr. Rodriguez was brought here as an infant. Resp. 5. This is his home.

Petitioners cite an extra-record "policy" ostensibly facilitating litigation from abroad by those seeking judicial review of removal orders. But only one-fifth of the Class would be even theoretically eligible for that option. J.A. 123. All other Class members, whose cases remain pending before the immigration court or BIA, would forfeit their claims by departing. Petitioners also present no record evidence that this policy actually works, and available extra-record material suggests it does not.[3]

Similarly, Petitioners cite only extra-record material to show they expedite detention cases. P.Supp. 14. The Ninth Circuit denied Petitioners' request to judicially notice such material. *See* Ninth Circuit Dkt. 133 at 3-4 (No. 13-56706). The record shows such policies are routinely ignored and fail to prevent lengthy detentions. J.A. 92, tbl.20 (Mandatory Subclass average 427 days); J.A. 97, tbl.27 (Arriving Subclass average 346 days). The

---

[3] *See* Tianyin Luo & Sean L. McMahon, *Victory Denied: After Winning on Appeal, an Inadequate Return Policy Leaves Immigrants Stranded Abroad*, 19 Bender's Immigr. Bull. 1061 (2014). Respondents cite this material only to illustrate why the Court should not rely on Petitioners' extra-record evidence.

Government regularly seeks adjournments, extensions, and stays in detained cases, and has taken months to process applications. *See, e.g.*, Resp. 49 (Government sought three stays in Rodriguez's case); J.A. 32-33 (Perez-Ruelas detained for over a year while DHS processed I-130 petition); J.A. 216-17 (eight months additional detention while DHS processed application to maintain LPR status, ignoring repeated requests for expedited processing).

Petitioners say detainees can *request* expedition, P.Supp. 46, but ignore that IJs need not *grant* those requests. The record shows these requests can be and are denied. Resp. 24 (IJ continued case for four months and denied motion to shorten). Comparative data analysis and Petitioners' own expert testimony establish that crowded dockets drive adjournment lengths. Resp. 24. Therefore, requests to expedite rarely serve to shorten detention.

II. PROLONGED DETENTION UNDER SECTION 1226(c) WITHOUT INDIVIDUALIZED CUSTODY HEARINGS VIOLATES THE DUE PROCESS CLAUSE.

Petitioners claim authority to incarcerate Mandatory Subclass members for years without custody hearings to determine flight risk or danger. This would constitute a dramatic expansion of Executive power at the expense of due process. The Court has always required that prolonged civil confinement remain reasonable in relation to a valid purpose, not just that it serve any purported one. *Compare Zadvydas*, 533 U.S. at 690, *with* P.Supp. 30. For that reason, due process requires individualized hearings to demonstrate a need for detention whenever it becomes prolonged. R.Supp. 16-17.

1. Petitioners contend the Court has repeatedly upheld detention incident to removal proceedings, P.Supp. 27, but they conflate detention with detention *without hearings*. Respondents do not dispute that many Subclass members can be detained for prolonged periods. However, none of Petitioners' cases authorize *prolonged* detention *without hearings*. R.Supp. 32-33 (discussing *Reno* v. *Flores*, 507 U.S. 292 (1993) and *Carlson* v. *Landon*, 342 U.S. 524 (1952)).

2. Petitioners insist *Demore* already authorizes prolonged mandatory detention, P.Supp. 28, but that issue was never presented to the Court. Mr. Kim challenged even a "brief period" of detention without custody hearings. *Demore*, 538 U.S. at 523. He did not raise, and the Court did not address, whether mandatory detention becomes unconstitutional when prolonged. *Cf*. *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) (issue not "squarely addressed" by prior decision remains "free" to be addressed "on the merits").[4]

3. *Zadvydas*, on which *Demore* relied, applied the principle that prolonged detention requires individualized justification in the immigration context. *Zadvydas* presumed the validity of mandatory detention for 90 days when a detainee loses his case, but required greater justification after six months. 533 U.S. at 700-01.

---

[4] Petitioners repeatedly suggest this case presents a "facial" challenge to detention under 1226(c). P.Supp. 4, 26. It does not. Respondents challenge the constitutionality of 1226(c) as applied to detainees held beyond six months. Respondents do not dispute its constitutionality in the vast majority of cases because they involve brief detentions.

Zadvydas required *release*, not merely a hearing, when removal was not significantly likely to occur in the reasonably foreseeable future because detention in those circumstances was no longer reasonable in relation to its purpose. *Id.* at 699-700. The Government implemented *Zadvydas* by adopting regulations to review detentions beyond six months, just as the lower courts ordered here. 8 C.F.R. 241.4(k)(1)(ii), (k)(2)(i).[5] As Judge Pryor explained, there is

> very little to distinguish the Supreme Court's approach in *Zadvydas* from the bright-line approach I endorse here. Both approaches permit the government to detain an alien for a period of six months and both also permit an alien's continued detention after the expiration of that period if the government can make the requisite showing justifying continued detention.

Sopo v. *U.S. Att'y Gen.*, 825 F.3d 1199, 1224 n.3 (11th Cir. 2016) (Pryor, J., dissenting).

4. Although Petitioners previously conceded that longer detentions require greater judicial scrutiny, Br. 47, they now take the counterintuitive position that the need for process *diminishes* when detention becomes prolonged, P.Supp. 31-33, even though the opposite rule applies in all other detention contexts. R.Supp. 16-18. Their arguments rest on speculation refuted by the record.

a. Petitioners contend the Government's interests increase as proceedings advance because detainees

---

[5] The implementing regulations place decision-making authority at DHS Headquarters. 8 C.F.R. 241.4(c)(2). That is understandable because the analysis requires weighing another nation's interest in repatriation. 8 C.F.R. 241.13. Here, the question is flight risk or danger, which IJs regularly consider.

have greater incentives to flee as cases near completion. That may be true in some cases, but it is plainly false in others, particularly where detainees are likely to win—as when they become eligible for relief after winning on appeal, J.A. 258-60, or remain detained while awaiting likely approval of a petition or relief application. J.A. 32-33. Mr. Rodriguez won after three-and-a-half years in detention (and seven years of litigation). Resp. 6. Another detainee won after 28 months. J.A. 83, tbl.15.

In cases like these, the Government's interest diminishes as detention becomes prolonged. Petitioners' one-size-fits-all approach routinely results in months and sometimes years of pointless detention for individuals who pose no flight risk or danger. It fails to allow any individualized consideration of whether a Class member's prolonged detention remains reasonable. *See generally* J.A. 209-36.[6]

Petitioners' extra-record assertion, which their expert never made, that Class members "almost never prevail[]" on either appeals from the IJ to the BIA or petitions for review from the BIA to the Ninth Circuit, P.Supp. 16-17, misinterprets two sets of data. Petitioners cite data about BIA appeals *from custody hearings*, not appeals from IJ removal orders. J.A.

---

[6] *Amici* 29 U.S. Representatives incorrectly assert cases rarely last beyond six months unless they involve appeals. Two thirds of Class members' cases had no appeal. J.A. 75, tbl.5. The average detention in these cases lasted 11 months. J.A. 76, tbl.6. *Amici*'s claim that extremely long detentions occur only during federal court review is also wrong. *E.g.*, *Nadarajah* v. *Gonzales*, 443 F.3d 1069, 1071 (9th Cir. 2006) (nearly five-year detention during immigration court proceedings); *Diop* v. *ICE/Homeland Sec.*, 656 F.3d 221, 223-26 (3d Cir. 2011) (nearly three-year detention).

526 (data on the "outcome of 1,680 bond hearings"). In fact, Class members win approximately 25% of removal order appeals to the BIA—five times higher than Petitioners suggested, and nearly three times higher than a litigant's likelihood of winning an appeal in federal court. *See* Statistical Tables for the Federal Courts, tbl.B-5 (June 30, 2016), http://www.uscourts.gov/sites/default/files/data_tables/stfj_b5_630.2016.pdf.

Petitioners likewise claim "only six" Class members won petitions for review at the Ninth Circuit, but their data only considers completed cases from a time when nearly 40% of all cases remained pending. J.A. 75, 84. This selection bias underrepresents those who win, because a granted petition is typically remanded for further proceedings (as in Mr. Rodriguez's case), whereas detainees who lose typically have no further proceedings. The data confirms this flaw in Petitioners' analysis. 33% of Class members with then-pending petitions went on to win their cases, a substantially higher rate than Petitioners report.[7]

Petitioners also contend prolonged detention is constitutional whenever it results from a continuance requested by a detainee because, in *Demore,* Mr. Kim sought a continuance. P.Supp. 31-32. But *Demore* mentioned that fact only to reject the argument that mandatory detention impermissibly deters appeals. 538 U.S. at 530 n.14. Respondents do not make that

---

[7] In district court, the parties' experts did not calculate success rates for either removal order appeals to the BIA or petitions for review to the Ninth Circuit. After receiving Petitioners' brief, Respondents' expert performed those calculations. Respondents have provided Petitioners with that analysis. Respondents maintain the Court should disregard both sides' extra-record evidence, *supra* n.3, but will lodge their expert's analysis upon request.

argument. Moreover, nothing in the *Demore* record apprised the Court that the immigration court system requires detainees who contest removal to seek adjournments. Here the record establishes that fact. Resp. 23-25.

Every court of appeals to address the question has held that prolonged detention cannot be justified merely because delay arises from a good faith challenge to removal. *Id.* (collecting cases). Whether detention is warranted in such cases can be determined only through an individualized custody hearing. *Id.* at 23.

b. "It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual . . . ." *Muniz* v. *Hoffman*, 422 U.S. 454, 477 (1975). Petitioners nonetheless suggest that Class members' liberty interests become *weaker* as detention lengthens. Petitioners erroneously "'minimize the importance and fundamental nature' of the individual's right to liberty." *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992) (quoting *United States* v. *Salerno*, 481 U.S. 739, 750 (1987)).

Petitioners insist detained individuals have "greatly diminished due process interests" in freedom from imprisonment because their "removability" is usually established. P.Supp. 35-36. By "removability," however, Petitioners refer only to whether the Government proves its charges, not whether a removal order will be entered. People in removal proceedings do not lose their right to reside in the United States merely because the Government proves a basis for possible removal. They retain their status until a removal order is entered, which does not occur unless and until all applications for relief are also denied (or, for appeals, until the BIA affirms a denial). *Matter of Lok*, 18 I&N Dec. 101, 105 (BIA

1981). Seventy percent of Subclass members sought such relief, J.A. 96, tbls.25-26, and although the decision to grant relief is discretionary, all applicants have "a right to a ruling on [their] eligibility." *INS* v. *St. Cyr*, 533 U.S. 289, 308 (2001) (internal quotations omitted). If they win, they are *not* ordered removed, and retain a "'right under the basic immigration laws to remain in this country.'" P.Supp. 36 (quoting *Zadvydas*, 533 U.S. at 720 (Kennedy, J., dissenting)).[8]

In any event, the relevant due process question always remains whether continued detention is warranted to further the Government's interests, not whether charges against a detainee have been established. Seven Justices in *Zadvydas* agreed that even detainees who had conclusively lost the right to remain nonetheless had rights against prolonged arbitrary detention. R.Supp. 21.

5. Petitioners assert the Due Process Clause only protects against "indefinite and potentially permanent" detention. P.Supp. 34. Their argument is foreclosed by *United States* v. *Salerno*, 481 U.S. 739 (1987). Citing *Addington* v. *Texas*, 441 U.S. 418 (1979), and *Jackson* v. *Indiana*, 406 U.S. 715 (1972), *Salerno* held a statute authorizing detention for limited periods, often shorter than six months, "must be evaluated in precisely the same manner that we evaluated the laws in the cases discussed above." 481 U.S. at 749. *Salerno* upheld the pretrial detention scheme only because it provided—within days of arrest—a "full-blown adversary hearing" at which

---

[8] Respondents refer to Class members as having "substantial defenses" if they have a substantial challenge to the charge or seek relief that, if successful, will prevent entry of a removal order. Resp. 20 n.5.

"the Government must convince a neutral decision-maker by clear and convincing evidence" that detention is necessary. *Id.* at 749-50; *id.* at 747 (describing hearing as "prompt" and citing 18 U.S.C. 3142(f)).

Petitioners assert that *Foucha* and *Addington* concerned only indefinite detention, but *Foucha* also relied on *Salerno*, 504 U.S. at 81, and *Addington* cited *In re Gault*, 387 U.S. 1, 12 (1967), which involved confinement of juveniles that was neither "indefinite [nor] potentially permanent." *Compare* 441 U.S. at 425, *with* P.Supp. 34.

6. In relying on *Barker* v. *Wingo*, 407 U.S. 514 (1972), and other speedy trial cases, P.Supp. 38-41, Petitioners again conflate the right to a hearing with the right to release. Those cases address the distinct constitutional question of when prolonged criminal proceedings so offend due process as to compel release (or dismissal) despite a finding of flight risk or danger. *Barker*, 407 U.S. at 519-20, 522. None of them condones prolonged detention without custody hearings. The detainees in those cases received initial custody hearings within days of arrest and at least one other custody hearing within the first six months of detention. *E.g.*, *State* v. *Brillon*, 183 Vt. 475 (2008) (two hearings within six months), *rev'd on other grounds*, 556 U.S. 81 (2009).[9] The relief ordered below is far more modest.

---

[9] *E.g.*, *United States* v. *Quartermaine*, 913 F.2d 910, 912-16 (11th Cir. 1990) (four hearings within five months); *United States* v. *El-Hage*, 213 F.3d 74, 76-81 (2d Cir. 2000) (per curiam) (two within five months); *United States* v. *Orena*, 986 F.2d 628, 629-31 (2d Cir. 1993) (two within six months); *United States* v. *Tortora*, 922 F.2d 880, 882 (1st Cir. 1990) (three within one month); *United States* v. *Hare*, 873 F.2d 796, 797-98 (5th Cir. 1989) (two within three months); *United States* v. *Gelfuso*, 838

Petitioners also claim the speedy trial cases show that district courts can efficiently make case-specific determinations. P.Supp. 47. District courts in those cases preside over the underlying criminal proceedings, and defendants can easily request custody hearings directly from the court. Here, the removal cases are before IJs. It is therefore efficient and fair to permit the same IJs to conduct custody hearings without requiring detainees to pursue habeas relief first.

7. Petitioners assert that permitting IJs to release people found to present no flight risk or danger leads to increased recidivism. However, the record establishes that when IJs employ intensive supervision, as they have in thousands of cases, they obtain extremely high appearance rates. R.Supp. 36.

Petitioners cite extra-record Congressional testimony by a former ICE director as evidence of "significant" recidivism, P.Supp. 45, although she did not provide a recidivism rate. *Oversight of United States Immigration and Customs Enforcement: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 34, 46 (2016) ("I have not done the math"). Petitioners disclosed the basis for this testimony—data extracted from "RAP" sheets—two weeks ago, making comprehensive analysis impossible. A partial review reveals an analysis rife with error. Petitioners treat infractions (e.g., traffic violations) as convictions, count apprehensions by ICE as criminal arrests, overlook obvious inaccuracies in RAP sheets

---

F.2d 358, 359 (9th Cir. 1988) (two within four months); *United States* v. *Zannino*, 798 F.2d 544, 545 (1st Cir. 1986) (per curiam) (two within five months); *United States* v. *Theron*, 782 F.2d 1510, 1511-12 (10th Cir. 1986) (two within three months); *United States* v. *Gonzalez Claudio*, 806 F.2d 334, 335-36 (2d Cir. 1986) (two within two months).

(e.g., offenses allegedly committed while a Class member was detained), count offenses by persons released under *Zadvydas* (who are released because no country will take them back, regardless of whether they present a flight risk or danger), and count offenses even if they likely occurred after immigration proceedings were complete.

Despite these biases, the extra-record material undermines Petitioners' claims. It shows 83.5% of 533 persons released beginning in 2012 had no post-release convictions. Among persons previously identified by Respondents as Class members, less than 1% were convicted of a violent felony after their release.

Respondents do not dispute that, as in all other contexts involving detention, some individuals granted release may fail to appear or commit offenses. But on this record, there is no basis to deprive *all* Class members of a hearing before an IJ to determine whether they may safely be released on conditions rather than face further preventive detention. Resp. 9-10, 39.[10]

III. UNDER THE DUE PROCESS CLAUSE, DETENTION BECOMES PROLONGED AT SIX MONTHS, AFTER WHICH AN INDIVIDUALIZED CUSTODY HEARING IS REQUIRED.

Outside the national security context, this Court has never approved incarceration for more than six

---

[10] Class members' liberty interests are not satisfied by *Joseph* hearings. *Joseph* hearings do not consider danger, flight risk, or even whether a detainee is likely to be ordered removed. They mandate detention unless DHS's charges are frivolous, rendering any protection they afford largely illusory. Resp. 21 n.6; Supp. Amicus Br. of NIP and ILRC 20-22.

months without a custody hearing. R.Supp. 39-40. Experience in the circuit courts has shown that a presumptive time limit on prolonged incarceration without a hearing is critical to provide meaningful due process protection.

Petitioners believe setting a time limit gives detainees a "powerful incentive" to engage in dilatory tactics to obtain custody hearings. P.Supp. 43. But the injunction has been in effect for over four years, and the record contains no evidence of increased court backlogs. *Cf.* R.Supp. 47 n.13. Petitioners speculate that detainees will engage in delay tactics because release rates at bond hearings are somewhat higher than win rates in removal proceedings. P.Supp. 43. This implausibly assumes detainees act upon aggregate, non-public comparative data rather than their own circumstances, and rests on pre-injunction data that likely understates the win rate for released Class members. J.A. 520-23, 574-75.

The reality is the injunction creates little, if any, incentive for delay. IJs can and will order continued detention when, in their view, a Class member engages in dilatory tactics suggestive of flight risk. But, as Petitioners concede, detainees often have valid reasons to seek additional time. P.Supp. 41, 43.

Finally, Petitioners claim the injunction is over-inclusive because it permits bond hearings for people whose "detention pending removal proceedings is constitutional." P.Supp. 46. This argument again illustrates Petitioners' most basic error—they conflate the legality of detention with the legality of detention *without a hearing*.

IV. DUE PROCESS REQUIRES CERTAIN SAFEGUARDS AT CUSTODY HEARINGS FOR PROLONGED DETENTION.

A. The Government Must Bear The Burden Of Proof By Clear And Convincing Evidence.

Due process requires the Government to bear the burden of proof by clear and convincing evidence where, as here, it seeks to deprive an individual of a liberty interest "more substantial than . . . loss of money." *Addington*, 441 U.S. at 424. Petitioners claim protections routinely required in other prolonged detention contexts do not apply to immigration detention. But procedures that may suffice for admission decisions or brief immigration detention, *Carlson*, 342 U.S. at 546, do not suffice to justify prolonged detention.[11]

Petitioners believe placing the burden of proof on the Government would result in more released Class members, causing danger to society. But they cite no evidence that the Government has been unable to carry its burden in any case where release created an ascertainable risk of danger. Unsubstantiated fears have never sufficed to justify preventive civil detention. *See Zadvydas*, 533 U.S. at 690-91.

Nor is there any support for Petitioners' concern that bearing the burden would result in "information asymmetry," P.Supp. 52, or greater risk of flight for Arriving Subclass members. Experience has shown that six months is ample time for DHS to meet its burden through interviews and by accessing

---

[11] The Bail Reform Act uses a "preponderance of the evidence" standard as to flight risk, but pretrial detention lengths are limited by the Speedy Trial Act. R.Supp. 51.

numerous national and international databases, fingerprint records, and immigration files. Arriving noncitizens who refuse to share information likely will not pass the credible fear interview. If they did, IJs would likely deem them flight risks. That Arriving Subclass members bear the burden at *admission* does not support a "judgment of caution," P.Supp. 51, when considering supervised release after they have passed credible fear interviews and been subjected to prolonged detention.

Neither statutory text nor history provides a clear basis to reject the longstanding due process norm that the Government bears the burden to justify prolonged civil detention. Petitioners cite 8 U.S.C. 1226(c)(2), which places the burden on noncitizens who satisfy a narrow exception to mandatory detention for Government witnesses, but that rule governs initial rather than prolonged detention. And while *Zadvydas* stated that noncitizens bear the burden to initiate habeas litigation, it made clear that a separate burden rule applies to administrative hearings before the agency. *See* 533 U.S. at 692 (criticizing "administrative proceedings" available to prolonged detainees because detainees bore the burden of proof).

In these circumstances, due process requires the Government to establish an individualized need for detention by clear and convincing evidence. *See Santosky* v. *Kramer*, 455 U.S. 745, 755-56 (1982) ("[T]he degree of proof required . . . 'is the kind of question which has traditionally been left to the

judiciary to resolve.'") (quoting *Woodby* v. *INS*, 385 U.S. 276, 284 (1966)).[12]

B. Hearings Must Occur Periodically And Include Consideration Of Detention Length.

Because the Government's justification for continued detention must be stronger when the deprivation of liberty becomes greater, Br. 47 (citing *Zadvydas*, 533 U.S. at 690, 701), it follows that IJs must conduct periodic hearings to consider the length of detention.

Petitioners claim the risk of erroneous deprivation without periodic hearings is "near zero," P.Supp. 48, because detainees may request a new bond hearing based on changed circumstances under 8 C.F.R. 1003.19(e). But in this context, "the bond hearing process would be fraught with peril if the Court were to place the burden on detainees to request a bond hearing," App. 143a, because Class members are often unrepresented, unfamiliar with the legal system, and lack English proficiency. App. 48a, 143a. That the Bail Reform Act adopts a "changed circumstances" standard also is not dispositive, because pretrial detention is governed by the "stringent time limitations of the Speedy Trial Act." *Salerno*, 481 U.S. at 747. Here, unless IJs consider detention length when assessing the Government's justification for additional detention, a Class member could be detained for years based on the showing made after six months.

---

[12] Petitioners point to legislative history about detention bed space and burden of proof regulations. P.Supp. 53-54. Neither pertains to the burden of proof for prolonged detention.

Petitioners also claim the cost of periodic hearings "looms large." P.Supp. 49. They forfeited that argument by stipulating not to rely on the cost of hearings. J.A. 588. That stipulation was sensible given that bond hearings typically last ten to fifteen minutes, are often conducted by video-conference, J.A. 573, and save the Government *millions* of dollars because the costs of detention dwarf those of supervised release. J.A. 529, fig.2; J.A. 88-89, tbl.18.[13]

---

[13] *Amici* raise several arguments that are foreclosed because Petitioners either abandoned or never raised them. Section 1226(e) does not bar the district court's jurisdiction both because it preserves review of "challenges [to] the statutory framework that permits . . . detention without bail," *Demore*, 538 U.S. at 517, and because it does not mention habeas. *Id.* Congress subsequently amended other provisions to foreclose habeas, but not Section 1226(e). *See* REAL ID Act of 2005, Pub. L. No. 109-13, §§ 101(e)-(f), 106, 119 Stat. 302, 305, 310-11 (amending several subsections of 8 U.S.C. 1252).

8 U.S.C. 1252(f)(1) also does not mention habeas. Moreover, Section 1252(f) does not bar relief for any "individual alien against whom [removal] proceedings have been . . . initiated," and therefore does not apply to Class members. It also exempts "the Supreme Court," which has independent authority to grant habeas relief. 28 U.S.C. 2241(a). *See also* App. 120a-126a. Section 1252(g) covers only three discrete actions, none of which is involved here. *See Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

Sovereign immunity does not apply because defendants are individual officers sued for injunctive relief, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 619-20 (1912), and because Congress waived it. 5 U.S.C. 702. Habeas jurisdiction is proper because all respondents are within the territorial jurisdiction of the district court. *Rumsfeld* v. *Padilla*, 542 U.S. 426, 447 (2004); App. 126a-127a. Finally, Petitioners waived any objections to personal jurisdiction and the use of class procedures for habeas cases by failing to raise them in the petition for certiorari.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

MARK H. HADDAD
SEAN A. COMMONS
SIDLEY AUSTIN LLP
555 West Fifth Street
Suite 4000
Los Angeles, CA 90013
(213) 896-6000

JUDY RABINOVITZ
MICHAEL K. T. TAN
CECILLIA D. WANG
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2618

DAVID D. COLE
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
915 15th Street, NW
Washington, DC 20005
(202) 544-1681

AHILAN T. ARULANANTHAM*
MICHAEL KAUFMAN
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017
(213) 977-5211
aarulanantham@aclusocal.org

JAYASHRI SRIKANTIAH
STANFORD LAW SCHOOL
IMMIGRANTS' RIGHTS CLINIC
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-2442

Counsel for Respondents

* Counsel of Record

February 21, 2017