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

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STATEMENT OF THE CASE

Respondents are members of a certified Class of thousands of people. The Government has incarcerated all of them for a prolonged period of time—at least six months and, in many cases, for years—while they defend against removal charges. The well-developed record in this case demonstrates that the Class includes many lawful permanent residents with minor criminal histories, asylum seekers who have passed an initial screening allowing them to raise their claims in removal proceedings, and others who present no danger or flight risk. The record also shows that the vast majority of Class members have substantial defenses to removal, and that a large majority who received a hearing before an Immigration Judge under the injunction issued below were granted bond because they present no danger or flight risk.

The central question is whether the immigration detention statutes must be read to require the prolonged incarceration of these individuals without an individualized custody hearing as to danger and flight risk, and, if so, whether they are constitutional.

Respondents do not seek the mass release of Class members, only individualized hearings required under this Court's civil detention precedents. By definition, the Class excludes noncitizens detained under statutes that expressly authorize prolonged detention for national security reasons. Unlike those statutes, the ones at issue here are silent as to the length of detention they authorize.

The Ninth Circuit correctly held that the applicable statutes do not authorize Class members' prolonged detention without custody hearings.

STATUTORY FRAMEWORK

This case concerns the interpretation and, potentially, the constitutionality of three immigration detention statutes: 8 U.S.C. 1226(c), 1225(b), and 1226(a). Fairly read, particularly in light of the constitutional concerns that would otherwise arise, Sections 1226(c) and 1225(b) do not authorize Class members' prolonged detentions, and Section 1226(a) does so only after a constitutionally-adequate custody hearing. None of the statutes specifically authorizes prolonged detention without hearings, in contrast to other immigration detention statutes that establish special review procedures for prolonged detention in national security cases. *Compare* 8 U.S.C. 1226(c), 1225(b), 1226(a), *with id.* 1226a(a)(6), (a)(7), 1537(b)(2)(C).

The Class includes three subclasses defined by the relevant immigration law provisions: Section 1226(c), Section 1225(b), and Section 1226(a).

1. The "Mandatory Subclass" consists of individuals residing in the United States who are detained under color of Section 1226(c), which provides that "the Attorney General shall take into custody any alien who" is made removable based on one of a broad range of criminal grounds—including certain misdemeanors and simple drug possession offenses—"when the alien is released" from criminal custody. Petitioners interpret Section 1226(c) to require detention for the duration of removal proceedings without any individualized custody hearing before an Immigration Judge (IJ), regardless of detention length.

2. The "Arriving Subclass" consists of noncitizens who present themselves at a port of entry and are subject to prolonged detention without hearings

under color of two provisions of Section 1225(b): Section 1225(b)(1)(B)(ii) and Section 1225(b)(2)(A). App. 108a.

Sections 1225(b)(1)(B)(ii) and (b)(2)(A) apply only to the small percentage of arriving noncitizens whom the Government refers for full removal proceedings before an IJ. In contrast, the large majority of individuals arriving at our borders and detained under Section 1225(b) are not in the Arriving Subclass because they face expedited removal.

Section 1225(b)(1)(B)(ii) provides that arriving individuals who are otherwise subject to expedited removal, but establish a "credible fear of persecution" during an initial interview, "shall be detained for further consideration" of their application for asylum, which occurs at a removal hearing.

> The credible fear standard is designed to weed out non-meritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process. If the alien meets this threshold, the alien is permitted to remain in the U.S. to receive a full adjudication of the asylum claim—the same as any other alien in the U.S.

H.R. Rep. No. 104-469, pt. 1, at 158 (1996).

Section 1225(b)(2)(A) applies to another category of individuals who arrive at a port of entry—those who are not subject to expedited removal because they possess documents providing some basis for admission, but who an immigration officer nonetheless determines are "not clearly and beyond a doubt entitled to be admitted." For example, lawful permanent residents (LPRs) returning from brief travel abroad may be subject to Section 1225(b)(2)(A) if an immigration officer concludes they have not established their right to admission. 8 U.S.C.

1101(a)(13)(C) (defining certain returning LPRs as "seeking . . . admission"). Under the statute, such LPRs "shall be detained for a [removal] proceeding." *Id.* 1225(b)(2)(A).

Thus, both Section 1225(b)(1)(B)(ii) and Section 1225(b)(2)(A) pertain to individuals who have been screened in by DHS for a full removal proceeding, rather than individuals subject to expedited removal. And both subsections authorize detention only "for" further consideration of such cases before an IJ, not "pending" those proceedings.[1]

Petitioners construe those provisions to prohibit individualized custody hearings before an IJ, no matter how prolonged the detention. On Petitioners' view, Arriving Subclass members can be considered for release only through the "parole" review process. *Id.* 1182(d)(5)(A). Department of Homeland Security (DHS) officers (i.e., the jailing authorities) informally conduct such reviews. Officers make parole decisions—that result in months or years of additional incarceration—by checking a box on a form that contains no specific explanation and reflects no deliberation. There is no hearing, no record, and no appeal. J.A. 225-26; J.A. 334-35; App. 39a. Extensive

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[1] The Subclass does not include individuals who were found *not* to have a credible fear of persecution. Such individuals are detained "pending" any review of the adverse credibility finding, and, if it is sustained, "until removed." 8 U.S.C. 1225(b)(1)(B)(iii)(IV). The Subclass also does not include individuals who crossed the border and entered the country without inspection. Such individuals are also detained under Section 1225(b)(1)(B)(ii), as "applicants for admission," but once they are found to have a credible fear and placed in removal proceedings, the agency provides them bond hearings. *Id.* 1225(a)(1), (b)(1)(A)(iii); *Matter of X-K-*, 23 I&N Dec. 731, 734-35 (BIA 2005).

record evidence establishes that the parole process causes arbitrary detentions because it lacks meaningful processes to correct even manifest errors. J.A. 226-34; App. 39a-40a.

3. The third subclass consists of individuals detained under Section 1226(a), which provides that a noncitizen "arrested and detained *pending* a decision on whether the alien is to be removed from the United States," (emphasis added), may be detained or released. Under implementing regulations, DHS conducts initial custody determinations, and IJs have authority to review those determinations at custody hearings. 8 C.F.R. 1236.1(d). The agency interprets those regulations to place the burden of establishing no danger or flight risk on the detainee. *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). If the IJ denies bond, regulations permit reconsideration only upon a material change in circumstances. The agency does not treat continued detention as a "changed circumstance." J.A. 317; App. 46a-47a.

Respondents contend Section 1226(a) governs the detention of all Class members and, in prolonged detention cases, the hearings it authorizes must include the following protections: (1) DHS bears the burden of proof by clear and convincing evidence; (2) hearings occur periodically; and (3) IJs consider the length of detention when determining whether release is warranted.

STATEMENT OF FACTS

1. Plaintiff Alejandro Rodriguez is a long-time LPR brought to the United States as an infant. He was employed as a dental assistant when DHS placed him in removal proceedings based on prior

convictions for possession of a controlled substance and "joyriding."

DHS detained Mr. Rodriguez for over three years while he challenged the removal charges before the IJ, Board of Immigration Appeals (BIA), and Ninth Circuit. After he moved for class certification in this case, DHS suddenly decided to release him. It then argued (unsuccessfully) that his release mooted the case and made him an unfit Class representative. App. 116a-18a.

Five months later, the Ninth Circuit granted the Government's unopposed motion to vacate and remand his case because the "joyriding" conviction was not an aggravated felony. Although he was still removable for a controlled substance offense, Section 1226(c)(1)(B), neither offense precluded him from seeking cancellation of removal. The IJ granted his application on remand, and he retained his LPR status. DHS chose not to appeal, thus ending the proceedings over seven years after they began. J.A. 257-60; J.A. 537-50. On Petitioners' view, Mr. Rodriguez apparently should have been detained during the entirety of that seven-year period before winning his case.

2. Mr. Rodriguez's case is not unique. The record documents numerous Class members whom Petitioners incarcerated for prolonged periods while they litigated meritorious defenses to removal. For example, one Mandatory Subclass member—a longtime LPR brought to the United States as a small child—was placed in removal proceedings based on a firearms offense. He was released on bond during his criminal proceedings and served eight days in jail. Nonetheless, Petitioners detained him without an opportunity for release for over 15 months. During this time, his pregnant U.S. citizen wife was forced

onto welfare, and he missed the birth of his daughter. He remained in detention while DHS processed an application permitting him to maintain his LPR status, which—despite repeated requests for expedited processing—took eight months. He was released after he won his case. J.A. 216-17.

Members of the Arriving Subclass also faced prolonged and arbitrary detention. One Subclass member, an Ethiopian asylum seeker, fled his homeland after he was abducted, held in captivity for over a year, and subjected to horrific acts of torture. After he escaped, he sought refuge in the United States, where he was incarcerated by DHS. He subsequently passed a credible fear screening and was referred for removal proceedings.

His sole opportunity for release while in proceedings was a parole determination. A DHS officer found he was not a danger, but denied release on the ground that his proof of identity was insufficient because "[t]here is an apparent correlation with all the Somalian Detainee's [sic] that present [sic] a paradigm of deceit and paralleled ambiguity of events and identity." J.A. 232-33. Had he been afforded a bond hearing, he would have had the opportunity to point out, among other things, that he was *not Somali*, as his government-issued photo identification showed. Instead, because the parole process provided him no hearing and no avenue to correct (or even be informed of) manifest errors, he remained detained. Eventually, an IJ granted him asylum. DHS declined appeal and he was released—six months after the parole denial, and after nine months of detention. J.A. 232-33; App. 40a; *see also* J.A. 229-31 (another Ethiopian detainee held over ten months based on the same error, even though DHS had previously verified his identity).

The record includes other detailed accounts of Class members' cases, as well as the underlying documents reflecting the review processes Petitioners employed prior to the injunctions. J.A. 209-69.[2]

3. Prior to the injunctions, hundreds of Class members were detained on any given day in the Central District of California. Their average detention was over 13 months, with a median of nearly one year. Over 20% were incarcerated for more than 18 months, and nearly 10% for more than two years. J.A. 71-73, tbls.2 & 3; App. 18a-19a.

Thus, the record confirms that, for Class members, the average detention lasts far longer than what the Court understood it to be in *Demore* v. *Kim*, 538 U.S. 510, 530 (2003) ("roughly a month and a half in the vast majority of cases . . . and about five months in [cases involving appeals]"). Petitioners recently acknowledged that *Demore* substantially understated detention lengths for cases involving appeals.[3]

4. DHS detains Class members in jails and private locked-down facilities under prison-like conditions. They wear jail uniforms and are subject to strict movement restrictions. Most can only have "no contact" visits with family—they talk on a phone

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[2] The record includes detailed information about approximately 1,000 Class members—all those who fell within the Class over a one year period—drawn from official government immigration files and databases; depositions; declarations; and the Government's policies and trainings. J.A. 203-07 (describing information sources).

[3] *See* Letter from Ian Heath Gershengorn, Acting Solicitor General, to Hon. Scott S. Harris, Clerk, Supreme Court 1-3 (Aug. 26, 2016), *Demore* v. *Kim*, 538 U.S. 510 (2003) (No. 01-1491).

across a transparent barrier for, at most, a few hours per week. J.A. 302-04; App. 20a.

Their prolonged detention imposes severe hardships on their U.S. citizen children and spouses. Excluding arriving asylum seekers, almost half of Class members arrived as children or young adults. J.A. 556-58. Over 60% have U.S. citizen children. *Id.*; App. 20a. Their detention deprives relatives, including sick parents and small children, of crucial support. *E.g.*, J.A. 217-19 (Class member unable to care for sick mother and then denied request to attend her funeral); App. 20a-21a.

5. Class members endure longer detentions than other noncitizens facing removal because most of them have substantial defenses that take additional time to litigate—such as an argument that the charge of removal is invalid, or grounds for relief such as cancellation of removal or asylum. J.A. 77, tbl.7; J.A. 86, tbl.17; J.A. 121-22; App. 19a. Class members are five times more likely to win their cases than the general detainee population. J.A. 122, tbl.35.

Seventy percent of Mandatory Subclass members filed applications for relief. Approximately 4% won their cases without the need to request relief, by arguing that DHS could not prove its charge. J.A. 96, tbls.25-26. Overall, nearly 40% won their cases. J.A. 95 & tbl.23; J.A. 135, tbl.38; App. 34a.

Their success reflects in part their comparatively minor criminal histories. Among Class members with some criminal history, most of whom are in the Mandatory Subclass, more than half had no conviction with a sentence of more than six months, and many spent far longer in immigration custody than criminal custody. J.A. 313-14; App. 34a.

Some faced prolonged detention despite receiving non-custodial sentences.

One LPR received a diversion sentence for drug possession, but was nonetheless subjected to mandatory detention despite evidence that he provided critical support to his ill mother and was a "standout" employee. He won his case, but only after ten months of detention. J.A. 211-13.[4]

6. Ninety-seven percent of Arriving Subclass members applied for asylum, and *two thirds* won. J.A. 98, tbl.28; J.A. 135, tbl.38; App. 40a. The overwhelming majority of them have no criminal history. J.A. 328; App. 20a.

PROCEEDINGS BELOW

This case arises from the third appeal in this litigation. In the first, the Ninth Circuit ruled the case could proceed as a class action, App. 101a-38a, after which Petitioners neither sought *certiorari* nor contested class certification on remand. In the second, the Ninth Circuit affirmed a preliminary injunction requiring bond hearings for the Mandatory and Arriving Subclasses. App. 61a-100a.

In the decision under review, the Ninth Circuit largely affirmed the district court's grant of permanent classwide relief. Applying the constitutional avoidance doctrine, the Ninth Circuit held that once detention under Section 1226(c) and 1225(b) becomes prolonged, those statutes no longer authorize detention. At that point, the Government's

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[4] Petitioners contend that "most" Class members with convictions lose their cases, Br. 45, but this ignores the significant barriers to success that detention itself imposes. J.A. 304-06; J.A. 521-24. Class members would prevail at even higher rates if released.

detention authority derives from Section 1226(a), which permits custody hearings. Looking to this Court's precedents, the Ninth Circuit held that detention becomes prolonged when it exceeds six months, and that DHS must provide a bond hearing at that point under Section 1226(a). App. 32a-38a, 39a-45a.

The Ninth Circuit also adopted certain protections necessary to satisfy due process requirements in prolonged detention cases: DHS bears the burden of proving danger and flight risk by clear and convincing evidence, the IJ must consider the length of detention, and periodic hearings must occur at six-month intervals. App. 51a-58a.

In the four years since the preliminary injunction issued, IJs have conducted thousands of hearings. In approximately 70% of them, an IJ found the Class member did not present a danger or flight risk and ordered release on bond or other conditions. J.A. 528. Of those permitted release on bond, 70% posted it. J.A. 529. The injunction also specifically requires IJs to consider release on alternatives to detention, including electronic ankle monitors. App. 53a. ICE's alternatives program—the Intensive Supervision Appearance Program (ISAP)—has achieved extraordinary success in ensuring appearance at removal hearings. J.A. 564-65 (DHS witness testimony that it achieved near-100% success in his region). By releasing individuals found not to present danger or flight risks, the injunction has saved millions of dollars in detention costs. J.A. 88-90.

SUMMARY OF ARGUMENT

1. An individualized hearing before a neutral decision-maker as to danger or flight risk is the bedrock due process requirement under this Court's

civil detention precedents. *See United States* v. *Salerno*, 481 U.S. 739, 750 (1987) (upholding pretrial detention of criminal defendants only with individualized findings of dangerousness or flight risk at bond hearings); *Foucha* v. *Louisiana*, 504 U.S. 71, 81-83 (1992) (requiring individualized finding of mental illness and dangerousness for civil commitment); *Kansas* v. *Hendricks*, 521 U.S. 346, 357 (1997) (upholding civil commitment of sex offenders after jury trial on dangerousness).

Demore v. *Kim*, 538 U.S. 510 (2003), carved out a narrow exception to the general rule that civil detention may be imposed only after an individualized hearing as to danger and flight risk. In doing so, the Court relied on two key factors: the Government's assertion that the average length of detention was "brief," and the individual respondent's concession of deportability. *Id.* at 513-14. Based on those factors, the Court held that the detention "necessarily" bore a close connection to the purpose of obtaining a (presumably imminent) removal order, and therefore satisfied due process. *Id*. at 528-29.

Demore does not control here because neither of its exceptional factors is present. First, the well-developed factual record here demonstrates that Class members, who by definition were detained for at least six months, were often incarcerated for much longer periods. Moreover, the brevity of detention asserted in *Demore* is undermined by the recent disclosure that the underlying data—submitted to this Court without prior adversarial testing—significantly understated the average detention length for some individuals under Section 1226(c). Because the deprivation of liberty at issue here is greater than in *Demore*, an individualized custody

hearing is required to ensure that detention continues to serve its purpose.

Second, the record demonstrates that a large majority of Class members present substantial defenses to removal, usually because their extensive ties, comparatively minor criminal histories, or other equities render them eligible for relief. They have powerful incentives to appear for removal proceedings that were largely absent in *Demore*, and cannot be conclusively presumed to present so great a danger or flight risk that they must always remain detained.

Because Class members' detentions do not come within *Demore*'s narrow exception, they violate the general rule that due process requires an individualized custody hearing.

Petitioners concede there may be some cases in which prolonged mandatory detention is unreasonable, but they contend there is no due process problem because detainees may file habeas petitions. But this Court has not held in its civil detention cases that the Government may be excused from its due process obligations because the courts can consider habeas petitions. Furthermore, the record below and experience in other circuits demonstrates that requiring Class members—who are often pro se, indigent, and not proficient in English—to file habeas petitions would deprive most of them of any detention review.

Petitioners specifically defend the denial of hearings to Arriving Subclass members, asserting that no due process constraints govern the detention of individuals stopped at the border. But detention "for any purpose" is governed by the Due Process Clause. *Addington* v. *Texas*, 441 U.S. 418, 425 (1979).

Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), on which Petitioners rely, involved an individual ordered summarily excluded on national security grounds. Arriving Subclass members, by contrast, are *not* subject to expedited removal and are *not* detained on national security grounds. They are entitled to freedom from prolonged arbitrary detention.

2. Although Petitioners' detention regime raises serious constitutional problems, this Court need not resolve them. The governing detention statutes are all silent as to length of detention and fairly can be read not to authorize prolonged detention without hearings. In *Zadvydas* v. *Davis*, 533 U.S. 678, 697 (2001), this Court applied constitutional avoidance to another detention statute, construing it not to permit "long-term" detention. It should do the same here.

All six circuits to consider the question have concluded that Section 1226(c) does not clearly authorize prolonged mandatory detention. Instead, they read the statute to include an implicit reasonable time limitation. The Ninth and Second Circuits read the immigration detention statutes as a whole, including the national security statutes, to define that reasonable time as six months. When Congress wished to authorize detention without an IJ hearing beyond six months, it said so clearly. 8 U.S.C. 1226a(a) ("the Patriot Act") specifically authorizes immigration detention for six-month periods, but with specialized review procedures, and only in national security cases. *Id.* 1537(b)(2)(C) refers specifically to detention beyond six months in a national security context as well.

The Ninth and Second Circuits also adopted the six-month approach because it utilizes an

administrable rule, following this Court's guidance in *Zadvydas*.

The Ninth Circuit similarly construed Sections 1225(b)(1)(B)(ii) and 1225(b)(2)(A) not to authorize prolonged detention without a hearing. These subsections do not even govern detention "pending removal proceedings," let alone for prolonged periods. Where Congress sought to authorize the detention of individuals "pending" proceedings, it said so explicitly, as in both Section 1226(a) and a different provision of Section 1225(b) that applies to individuals who (unlike Class members) have *not* been screened in for removal proceedings. *Id.* 1225(b)(1)(B)(iii)(IV) ("[The] alien . . . shall be *detained pending* a final determination of credible fear of persecution and, if found not to have such a fear, *until removed*." (emphases added)).

Detention authority under Sections 1225(b)(1)(B)(ii) and 1225(b)(2)(A) only applies until removal hearings begin, after which detention is governed by Section 1226(a), which already permits bond hearings.

3. Petitioners nonetheless insist they must incarcerate Class members for prolonged periods without hearings. Their arguments are contrary to the factual record and this Court's precedents.

Petitioners argue that providing bond hearings to Class members threatens public safety. This ignores that IJs deny release to those found to present a danger or flight risk. Moreover, the record refutes that claim. Many Class members have minor criminal histories, long-standing community ties, and substantial defenses that create powerful incentives to appear for hearings. Furthermore, the record shows that DHS can achieve extremely high appearance rates through its Intensive Supervision

Assistance Program (which did not exist when *Demore* was decided); the injunction requires IJs to consider releasing Class members into such intensive programs.

Petitioners also allege, without evidence, that the injunction will encourage dilatory tactics by detainees. However, all requests for additional time are not dilatory. The IJ presiding over the bond hearing will be most familiar with the facts, and well-situated to identify detainees who pursue frivolous defenses or continuances. Such individuals can be denied release because they present flight risks. And that some detainees may engage in such behavior does not obviate the need for a hearing. *Cf. McNeil* v. *Dir., Patuxent Inst.*, 407 U.S. 245, 251 (1972) ("[I]f confinement is to rest on a theory of civil contempt, then due process requires a hearing to determine whether petitioner has in fact behaved in a manner that amounts to contempt.").

Finally, Petitioners assert without evidence that the mere provision of a custody hearing to Arriving Subclass members will lead to a massive breach of border security. Respondents do not seek a mass release, only individualized hearings. Moreover, Petitioners *already* provide bond hearings to the far larger number of individuals who cross without inspection, are arrested after entry, and are subsequently found to have a credible fear of persecution. *Matter of X-K-*, 23 I&N Dec. 731, 734 (BIA 2005). Therefore, to the extent the injunction has any effect on the incentives of people fleeing persecution, it *encourages* them to present themselves at the border rather than cross without inspection.

4. The Ninth Circuit correctly applied this Court's civil detention precedents to require certain

minimal safeguards in prolonged detention custody hearings. As detention becomes more prolonged, the deprivation of liberty increases and warrants increased safeguards. *Zadvydas*, 533 U.S. at 701. The Ninth Circuit rightly required the Government to demonstrate danger or flight risk by clear and convincing evidence at periodic hearings that take into account detention length.

Petitioners resist those safeguards, citing the plenary power doctrine. But this case does not implicate Congress' plenary authority to regulate admission; it concerns freedom from physical restraint, where the plenary power "is subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695. For over a century, this Court has construed immigration statutes to include additional procedures in order to avoid due process problems. *See Yamataya* v. *Fisher*, 189 U.S. 86, 101 (1903); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50 (1950).

ARGUMENT

I. DUE PROCESS PROHIBITS PROLONGED CIVIL CONFINEMENT WITHOUT INDIVIDUALIZED CUSTODY HEARINGS.

A. Prolonged Detention Must Be Supported By An Individualized Hearing Before A Neutral Decision-Maker Who Assesses Danger And Flight Risk.

1. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690.

An individualized hearing as to danger and flight risk is the most basic due process requirement for

civil detention. But it is absent here. No other civil detention system permits incarceration of this length without an individualized hearing on danger and flight risk. This Court's cases require hearings before a neutral decision-maker at which the Government not only must establish the existence of some characteristic—such as probable cause that a crime has been committed or harm-threatening mental illness—that connects the detention to the purpose of the scheme, but *also* must make an individualized showing that the detainee presents a danger or flight risk. *See Salerno*, 481 U.S. at 750 (upholding civil pretrial detention of individuals charged with crimes only upon individualized findings of dangerousness or flight risk at custody hearings); *Foucha*, 504 U.S. at 81-83 (requiring individualized finding of mental illness and dangerousness for civil commitment); *Hendricks*, 521 U.S. at 357 (upholding civil commitment of sex offenders after jury trial on lack of volitional control and dangerousness).

In addition, when faced with *prolonged* confinement, this Court requires rigorous individualized procedures to ensure that detention length remains reasonable in relation to its purpose. *See generally Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972) ("*duration* of commitment" must bear "reasonable relation" to its purpose) (emphasis added). *Cf. McNeil*, 407 U.S. at 249 ("If the commitment is properly regarded as a short-term confinement with a limited purpose . . . then lesser safeguards may be appropriate, but . . . the duration of the confinement must be strictly limited."). Petitioners themselves recognize that "because longer detention [is] a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the

means and the ends more closely." Br. 47 (citing *Zadvydas*, 533 U.S. at 701).

2. *Demore* carved out a narrow exception to the general rule described above. *Demore* upheld an individual's detention under Section 1226(c) without a hearing on danger and flight risk based on two factors: the Government's submission of data purporting to show the brevity of detention under the statute, and the fact that the detainee had conceded his deportability. Under those circumstances, the Court found that "brief" detention without a custody hearing was sufficiently tailored to the purpose of effectuating the presumably imminent entry of a removal order. 538 U.S. at 528-29.

Demore's narrow exception to the general rule requiring individualized custody hearings does not apply here because neither of the factors the Court relied upon is present. *First*, *Demore* was grounded in the Court's belief, derived from the Government's data, that detention lasts "roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." *Id.* at 530. That understanding was incorrect. Furthermore, the detentions in this case are not brief. They average more than thirteen months, and more than fourteen for Mandatory Subclass members. J.A. 71-73; J.A. 95, tbl.24; App. 34a.

Second, unlike the detainee in *Demore*, a significant majority of Class members assert substantial defenses to removal. J.A. 95, tbl.23; J.A. 135, tbl.38; J.A. 96, tbls.25-26; App. 34a. These defenses give Class members powerful incentives to appear at hearings. Moreover, they often remain eligible for relief because they are individuals with comparatively minor criminal histories and deep ties to the

United States, and therefore do not present the type of categorical danger and flight risk that would necessarily justify detention.[5]

For example, Petitioners subject long-time LPRs with convictions for controlled substance possession to mandatory detention, even though they remain eligible for cancellation of removal, adjustment of status, and other forms of relief. *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1682, 1692 (2013). If they prevail, no removal order is ever entered. *See Matter of A-M-*, 25 I&N Dec 66, 73 n.8 (BIA 2009). Such individuals are routinely detained for years until they win. J.A. 313-14 (documenting three Subclass members with controlled substance offenses—for which they were sentenced to three months or less—detained one year and eight months, one year and nine-and-a-half months, and two years and one-and-a-half months before winning).

Petitioners argue that prolonged mandatory detention is more acceptable where the relief sought

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[5] Respondents use "substantial defenses to removal" to describe either a substantial defense to the charged ground of removability or eligibility for relief that will prevent entry of a removal order. The term does not include forms of relief, such as withholding of removal, that merely prevent the *execution* of a removal order to a particular country. The record here shows that 97% of Class members who sought relief had "substantial defenses to removal" under this definition. J.A. 94, tbl.22 (only 3% of Class members who applied for relief sought a form that would not prevent entry of a removal order, such as withholding). In *Demore*, this Court noted a legal distinction between a detainee's concession that he "is deportable," and a concession that he will "ultimately be deported." 538 U.S. at 523 n.6 (emphasis omitted); *see also* 8 C.F.R. 1208.16(f). The detainee in *Demore* sought only withholding of removal, and therefore did not have a substantial defense, as most Class members do.

is discretionary. Br. 41. However, whether relief is discretionary or mandatory is irrelevant to the purpose of detention. DHS lacks authority to remove individuals while they pursue substantial defenses, and those who prevail are never ordered removed. *See INS* v. *St. Cyr*, 533 U.S. 289, 307-08 (2001) (forms of relief "governed by specific statutory standards provide[] a right to a ruling on an applicant's eligibility" (internal quotes omitted)).

Under these circumstances, prolonged incarceration constitutes a serious deprivation of liberty that will often bear little or no relationship to effectuating a removal. *See Demore*, 538 U.S. at 531 (Kennedy, J., concurring) ("the ultimate purpose behind the detention is premised upon the alien's deport-ability").[6]

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[6] Petitioners have not argued that hearings under *Matter of Joseph*, 22 I&N Dec. 799, 801 (BIA 1999), satisfy the individualized custody hearing requirement, and any such argument would fail. *Joseph* hearings permit detainees to challenge whether they are properly subject to mandatory detention by showing that DHS's charges are "substantially unlikely" to prevail. *Id.* at 806. *Joseph* hearings do not consider danger and flight risk. They also do not consider whether the individual may obtain relief from removal. *Joseph* therefore does not ensure that prolonged detention remains reasonably related to its purpose. *See Demore*, 538 U.S. at 514 n.3 (declining to consider the adequacy of *Joseph* hearings).

The Court could avoid one aspect of the constitutional problem here by altering the *Joseph* standard. If the Court construed the phrase "is deportable" in Section 1226(c) to exclude those with substantial defenses, *i.e.*, those with a substantial challenge to the charges or those eligible for relief that would prevent entry of a removal order, then many Subclass members would no longer be "deportable" under Section 1226(c). *Demore*, 538 U.S. at 578 (Breyer, J., dissenting). *Cf.* 8 U.S.C. 1101(a)(47)(A) (using "deportable" to refer to final order mandating removal).

3. Petitioners' reading of *Demore* contradicts *Zadvydas*, which recognized that immigration detention, like other forms of non-punitive incarceration, must "bear a reasonable relation to [its] purpose." 533 U.S. at 690-91 (alterations omitted). The Court did not limit that principle to situations of "potentially permanent" detention. Indeed, *Zadvydas* relied on *Salerno*, which emphasized the requirement of individualized hearings in the pretrial context, which also involves detention of finite length. *See also Jackson*, 406 U.S. at 738 ("duration" of civil confinement must remain reasonable). The detention lengths here are comparable to those in *Zadvydas*. J.A. 72 (Class members detained over three and four years); *Casas-Castrillon* v. *Dep't of Homeland Sec.*, 535 F.3d 942, 945 (9th Cir. 2008) (seven-year detention).

Contrary to Petitioners' assertion, *Demore* did not "implicitly foreclose[]" a "*Zadvydas*-type rule," Br. 36, because the detainee did not argue that his detention was unauthorized because of its length or otherwise seek a rule just for prolonged detention cases. He argued that even brief detention without a custody hearing was unconstitutional, and the Court construed his petition as having conceded that the statute authorized his detention. 538 U.S. at 513-14. For that reason, *Demore*'s holding did not focus on prolonged detention or consider alternative statutory constructions. Even the Government suggested the Court need not address "prolonged detention," which "imposes a greater burden upon the alien." *See* Pet. Br. 48, *Demore*, No. 01-1491 (U.S. filed Aug. 29, 2002).

Although *Demore* is distinguishable for these reasons, should the Court disagree, it should overrule *Demore* because it rests on erroneous facts and failed

to require an individualized custody hearing as to danger and flight risk.

B. The Theoretical Possibility Of Habeas Corpus Relief In Cases Of Unreasonable Government Delay Does Not Satisfy Due Process.

Petitioners contend that detention always remains reasonable, and therefore requires no hearing, except in "rare" cases where the Government has unreasonably caused delay. Br. 47-48. They contend such instances are adequately addressed through habeas proceedings. Petitioners' position disregards the factual record and is contrary to this Court's due process precedents.

1. Every court of appeals to consider it has rejected Petitioners' draconian view that all mandatory detention necessarily remains reasonable in relation to its purpose if the delay is caused by the time needed for individuals to litigate their cases, regardless of detention length. *Compare* Br. 39-40, *with Sopo* v. *U.S. Attorney Gen.*, 825 F.3d 1199, 1218 (11th Cir. 2016); *Ly* v. *Hansen*, 351 F.3d 263, 272 (6th Cir. 2003); *Chavez-Alvarez* v. *Warden York Cty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015); *Reid* v. *Donelan*, 819 F.3d 486, 500 n.4 (1st Cir. 2016). The lengthy detention of people pursuing substantial defenses often does not serve the statute's purpose.

Furthermore, the record refutes Petitioners' claim that individuals are responsible for the length of detention. Petitioners have structured immigration proceedings so as to *require* detainees to seek multiple "adjournments" to present their defenses. J.A. 307-09. *See generally* J.A. 496 (Government categorizes rescheduled hearings as "adjournments"). Under Petitioners' system, the first scheduled

hearing is a "master calendar," akin to a criminal arraignment; the only way to resolve a case at that hearing is to give up. Applying for forms of relief requires at least one and usually multiple further hearings, because court rules require a separate date to submit the application and then at least one other for merits hearings. J.A. 307-09; J.A. 287-88; Ex. B § 3.1(b)(iii)(A), ECF No. 319; Decl. of Cody Jacobs Ex. E, Fong Dep. at 130:17-25, ECF No. 291. Petitioners fault Class members for adjournments even where *required* to pursue claims, or where the Government is ultimately responsible for the delay. J.A. 147 (classifying as "alien-caused" adjournments taken because DHS is adjudicating petition); J.A. 32-33 (named Plaintiff Perez-Ruelas detained for over a year while DHS processed and granted I-130 petition).

Detainees who request adjournments also have no control over their *length*. Crowded dockets cause lengthy adjournments, as comparisons across different time periods and detention centers confirms. Decl. of Michael Tan Ex. D, Palmer Dep. at 79:25-80:6, ECF No. 283 (Petitioners' expert acknowledging that pattern of forty-day continuances suggests length driven by court scheduling); Decl. of Talia Inlender ¶¶ 4, 6, ECF No. 252-1 (documenting case where IJ continued matter for four months and denied motion to shorten continuance); Decl. of Susan Long Ex. C, ECF No. 281-6 (tables showing substantial historical and geographic variation in case processing times for comparable detainee populations within Central District); Opp'n to Defs.' Statement 2, ECF. No. 313.[7]

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[7] Contrary to Petitioners' suggestion, Br. 43, the Ninth Circuit enforces the regulatory requirement that a continuance should be granted only for "good cause," and provides IJs ample leeway

Class members also do not control how long the BIA and circuit courts take to resolve appeals. *See* J.A. 76 (average detention length nearly 15 months for Class members with BIA appeals; over 22 months for those with petitions for review).[8]

2. Petitioners' position also misunderstands the due process precedents requiring an individualized custody hearing. Petitioners cite no civil detention case where this Court has excused the Government from complying with the custody hearing requirement because a court could grant habeas relief. As the Eleventh Circuit explained, "[t]he constitutional principles . . . apply to the government's conduct—detaining criminal aliens—whether a § 2241 petition is filed or only potentially forthcoming. The government is constitutionally obligated to follow the law . . . ." *Sopo*, 825 F.3d at 1217 n.8. In other civil detention contexts, this Court has made clear that due process obligations exist separate and apart from habeas corpus. *See, e.g.*, *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality) (setting forth distinct due process hearing requirements even though "[a]ll agree suspension of the writ has not occurred here").[9]

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to deny continuances. *E.g.*, *Sandoval-Luna* v. *Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008) (per curiam) (upholding denial of second continuance).

[8] Petitioners seek support for their view from *Demore*'s rejection of the argument that mandatory detention is impermissible because it deters appeals. 538 U.S. at 530 n.14. But it does not follow that all of the time detainees spend incarcerated while pursuing defenses is necessarily reasonable, regardless of its length, the strength of the defense, and other circumstances.

[9] After *Zadvydas* set forth the applicable constraints on detention authority in that context, the Government amended

Petitioners also suggest that habeas suffices because only the "rare" individual will win release in a hearing. The record refutes this; roughly 70% of Class members are found eligible for release at hearings. J.A. 528-29. Furthermore, Petitioners' argument turns the due process rule on its head. That some subset of individuals will be denied release after a hearing on danger and flight risk does not undercut the principle that all must be afforded that hearing.

3. Imposing a requirement that Class members file a habeas petition also fails to remedy the constitutional violation arising from prolonged detention without hearings because it effectively robs many detainees of any opportunity for detention review. "[D]etainees, who typically have no choice but to proceed *pro se*, have limited access to legal resources, often lack English-language proficiency, and are sometimes illiterate." App. 48a; *cf.* App. 143a (finding that the "bond hearing process would be fraught with peril if the Court were to place the burden on detainees to request a bond hearing").

For those who do file, district courts often take months to decide petitions, in part because courts must familiarize themselves with a previously-unknown removal case, all to decide whether to order a bond hearing where an IJ will reconsider largely the same evidence. *Reid*, 819 F.3d at 498 ("the federal courts' involvement is wastefully duplicative").

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its review procedures to comply with those procedural and substantive constraints. *E.g.*, 8 C.F.R. 241.4(k)(1)(ii), 241.13.

C. There Is No Exception To The Prohibition On Prolonged Detention Without Hearings For Arriving Subclass Members.

Petitioners make a specific argument that applies only to the Arriving Subclass, contending that the parole review process satisfies constitutional requirements because individuals who presented themselves at the border have no right to liberty. The Court should reject Petitioners' position, because this Court's due process doctrine does not permit Subclass members' liberty to be left entirely to the arbitrary decisions of DHS officers.

1. All Arriving Subclass members—noncitizens litigating in full removal proceedings, most of whom are asylum seekers who have been found to have a credible fear of persecution—are "persons" who retain Fifth Amendment rights against arbitrary imprisonment. "[C]ivil commitment *for any purpose* constitutes a significant deprivation of liberty." *Addington*, 441 U.S. at 425 (emphasis added); *see also Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) ("both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious"); *Rosales-Garcia* v. *Holland*, 322 F.3d 386, 408 (6th Cir. 2003) (en banc) (finding serious constitutional problems with indefinite detention of excludable noncitizens).

This Court requires hearings where far lesser interests are at stake. *E.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 268 (1970) (failure to provide in-person hearing prior to termination of welfare benefits was "fatal to the constitutional adequacy of the procedures"); *Califano* v. *Yamasaki*, 442 U.S. 682,

696 (1979) (in-person hearing required for recovery of excess Social Security payments).[10]

2. Petitioners suggest these basic principles are inapplicable to Arriving Subclass members under *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), but *Mezei* does not permit the prolonged arbitrary detention of Subclass members, for three reasons.

First, though it mentioned the Government's power to detain, *Mezei* primarily concerned the power to exclude. The detainee was "denied entry" and had lost his case. *Id.* at 212. In contrast, all Subclass members have been referred for full removal hearings; 97% have substantial defenses to removal, and two thirds of them will win their cases. J.A. 98, tbl.28; J.A. 135, tbl.38; App. 40a. Thus, they have *not* "been determined to be removable after a fair hearing under lawful and proper procedures," *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting), and the great majority never will be.

Whatever *Mezei* establishes about the Government's power to summarily exclude arriving noncitizens, it does not hold that those who are *not* being summarily removed have no rights against arbitrary detention. The Government has no legal authority to remove Arriving Subclass members unless and until they lose their cases, which most

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[10] International law further supports custody hearings, because it prohibits arbitrary detention. *See Zadvydas*, 533 U.S. at 721-22 (Kennedy, J., dissenting). At a minimum, individuals are entitled to "adequate procedures to review their cases." *Id.* That international law requires procedures more robust than those afforded by the parole review process also counsels in favor of Respondents' interpretation of the statute. *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

never will. Although they have no permanent right to remain, they do have a right to be free from arbitrary "physical restraint," *Zadvydas*, 533 U.S. at 690, while their cases remain pending.[11]

Second, *Mezei*'s detention holding rests on national security considerations not present in this case. *Mezei* authorized prolonged detention because "to admit an alien barred from entry *on security grounds* nullifies the very purpose of the exclusion proceeding." 345 U.S. at 216 (emphasis added). That rationale does not apply here. Releasing those Subclass members who pose no flight risk or danger would not *itself* defeat the purpose of removal proceedings, and there is no suggestion that it would threaten national security. *Cf. Jean* v. *Nelson*, 472 U.S. 846, 854-55 (1985) (construing parole regulation to prohibit race discrimination and therefore not deciding whether *Mezei* applied); *see also id.* at 859, 872-74 (Marshall, J., dissenting) (disagreeing with majority for failing to decide constitutional issue, and concluding that *Mezei* was inapplicable because "the narrow question decided in . . . *Mezei* was that the denial of a hearing in a case in which the Government raised national security concerns did not violate due process").

Third, *Mezei* predates this Court's civil detention precedents, *see supra* Point I.A., and, in particular,

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[11] Contrary to Petitioners' assertions, Br. 20, the *Mezei* dissenters did not agree either that Mr. Mezei could be detained without a custody hearing or that he could be held for whatever period necessary to effectuate his exclusion, no matter its length. *Mezei*, 345 U.S. at 227 (Jackson, J., dissenting) (concluding that Mezei's detention could be enforced only through procedures "which meet the test of due process of law"); *id.* at 217 (Black, J., dissenting) ("I join MR. JUSTICE JACKSON in the belief that Mezei's continued imprisonment without a hearing violates due process of law.").

Zadvydas' application of them to hold that even an individual who had lost the right to "live at large" in this country retained an interest in "[f]reedom from . . . physical restraint." 533 U.S. at 690, 696. Released Subclass members can be subject to forms of intensive supervision that significantly restrain their liberty in order to ensure their appearance, if removal ever becomes legally authorized. *See id.* at 695-96 ("The choice, however, is not between imprisonment and the alien 'living at large.'").

3. The Government's parole review process for the Arriving Subclass is not an adequate substitute for an IJ hearing because, as the record demonstrates, it gives rise to prolonged arbitrary detention. Prior to the injunctions in this case, Petitioners detained Arriving Subclass members without hearings for an average of nearly one year, J.A. 97, tbl.27; App. 40a, even though a large majority win their cases and virtually all have no criminal history. J.A. 98, tbl.28; J.A. 135, tbl. 38; J.A. 328; App. 20a, 40a.

No other detention regime permits the jailing authority to impose months or years of incarceration simply by checking a box on a form that provides no explanation, reflects no deliberation, and includes no hearing, no record, and no appeal. J.A. 225-26; App. 39a. Respondents uncovered extensive evidence of arbitrary detention resulting from the flawed parole review process.

For example, a Somali asylum seeker fled his country after both of his brothers were killed in political violence. He had no criminal history in any country. He passed his credible fear interview, established his identity, and passed security checks required by regulations. Yet DHS denied release on parole by checking the box for flight risk. They

provided him no other explanation. Eight months after his detention began, an IJ granted him asylum, but he remained detained because DHS reserved appeal. The appeal lasted seven more months (including additional time for an extension that DHS obtained). He won release only after prevailing on appeal, after 15 months of pointless incarceration, for which he never received any explanation. J.A. 234-35.

Another Subclass member was denied release based on documents that referred to the wrong detainee; he was ultimately detained for over ten months without a bond hearing, and released only after he won asylum. J.A. 234. In other cases, DHS officers used some detainees as translators and recommended denying parole because the interviewees allegedly asked to remain incarcerated. J.A. 235. In other cases, officers ignored material evidence, leading to further pointless detention. J.A. 227-28; *see also Nadarajah* v. *Gonzales*, 443 F.3d 1069, 1071 (9th Cir. 2006) (arriving asylum seeker detained four and a half years while case pending, despite repeatedly winning asylum before IJ).

The record establishes that the parole process lacks any meaningful opportunity for detainees to be heard and any mechanism to catch even manifest errors. It results in months, and sometimes years, of pointless incarceration. J.A. 334-35, 339. *See generally* J.A. 226-35; App. 39a-40a.

4. Petitioners' detention review procedures are also unconstitutional as to LPRs returning from brief travel abroad, who clearly remain "person[s] within the protection of the Fifth Amendment" entitled to the full protections of the Due Process Clause. *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 (1953); *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) (LPR

accused of crime while abroad entitled to due process in exclusion proceedings).

Petitioners assert that only a few LPRs are detained under Section 1225(b), but Petitioners forfeited this argument in district court. They never disputed either the prevalence of returning LPRs in the Subclass or the status of the returning LPR identified in the record. J.A. 276. The Government has consistently applied Section 1225(b)(2)(A) to deny bond hearings to LPRs returning from brief travel, and courts regularly decide cases about such individuals. *E.g.*, *Vartelas* v. *Holder*, 132 S. Ct. 1479, 1485 (2012).[12]

Petitioners contend that returning LPRs classified by statute as "seeking admission" may be treated as first-time entrants for constitutional purposes. Br. 27-28. That position is foreclosed by *Landon*, which applied due process protections in exclusion proceedings to a returning LPR, even though she was, as a statutory matter, subject to exclusion proceedings because of alleged unlawful conduct abroad. 459 U.S. at 32-36. *Accord Kwong Hai Chew*, 344 U.S. at 600; *Mezei*, 345 U.S. at 213-14.

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For these reasons, the Due Process Clause does not permit the prolonged detention of Class members without individualized custody hearings.

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[12] *Bautista* v. *Sabol*, 862 F. Supp. 2d 375, 377-78, 381 (M.D. Pa. 2012) (LPR detained more than 2 years); *Arias* v. *Aviles*, No. 15-CV-9249 (RA), 2016 WL 3906738, at *7 (S.D.N.Y. July 14, 2016) (LPR treated as seeking admission because of criminal activity while abroad), *appeal filed*, No. 16-3186 (2d Cir. Sept. 12, 2016).

II. THE IMMIGRATION DETENTION STATUTES DO NOT AUTHORIZE CLASS MEMBERS' PROLONGED DETENTION WITHOUT CUSTODY HEARINGS.

The Court need not decide the constitutional issues, because a "fairly possible" construction of the detention statutes is available that avoids these serious constitutional concerns. *Zadvydas*, 533 U.S. at 689. Petitioners contend that the Court should not apply the avoidance canon because constitutional problems under the statute will be "rare." Br. 15. The record shows such cases are common, and in any event, Petitioners cite no authority for the premise that the avoidance canon gives way where the percentage of cases presenting a constitutional problem dips below some imaginary limit. Alternative constructions must be sought when "one of the statute's applications" raises constitutional concerns, even if other applications "would not support the same limitation." *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005). As explained below, such constructions are available.

None of the statutes at issue here authorizes prolonged mandatory detention. Section 1226(c) authorizes detention for only a reasonable six-month period of time, after which detention authority derives from Section 1226(a), the default statute governing detention "pending a decision on whether the alien is to be removed." Sections 1225(b)(1)(B)(ii) and 1225(b)(2)(A) authorize detention only prior to the commencement of removal proceedings, after which detention is also governed by Section 1226(a). And even if Section 1225(b)'s provisions apply to pending proceedings, they too authorize detention for only a reasonable six-month period.

A. Section 1226(c) Authorizes Mandatory Detention For Only A Six-Month Period, After Which Section 1226(a) Governs.

Petitioners read Section 1226(c) to authorize unlimited detention without review. All six circuits to consider the issue have rejected that interpretation, and instead construed it to contain an implicit reasonableness limitation after which the Government must justify continued detention at a bond hearing. *Sopo*, 825 F.3d at 1212-13 (collecting cases).

The absence of any temporal limit in Section 1226(c), coupled with the specific authorization for detention beyond six months with limited review in the Patriot Act, shows that Congress did not clearly intend to authorize prolonged mandatory detention under this statute. Adopting a six-month rule also comports with this Court's use of similar rules of administrability in other contexts.

1. Section 1226(c) Does Not Clearly Authorize Mandatory Detention Beyond Six Months.

1. Section 1226(c)(1) provides that the Government shall take certain noncitizens into custody for removal proceedings, but does not say for how long. Under *Zadvydas*, that silence cannot be construed to authorize prolonged mandatory detention, because Congress must use "clearer terms" to authorize "long-term detention." 533 U.S. at 697.

Section 1226(c)(2)'s narrow authorization for the discretionary release of certain individuals when necessary to protect a witness does not "clearly demonstrate[]" that Congress intended Section 1226(c)(1) to authorize prolonged mandatory detention of all others. *Id*. at 699. The detention

statute in *Zadvydas* contained an express exception requiring release of certain individuals after ninety days, but *Zadvydas* nonetheless read a neighboring provision to contain an implicit six-month limit. *Compare* 8 U.S.C. 1231(a)(3) (requiring release for some noncitizens not removed after 90 days), *with* 1231(a)(6) (authorizing detention "beyond" that period for others).

2. Congress' response to *Zadvydas* underscores that Section 1226(c) does not clearly authorize prolonged mandatory detention. Four months after *Zadvydas*, Congress explicitly authorized prolonged detention under specialized review procedures for national security detainees in the Patriot Act (8 U.S.C. 1226a).

The Patriot Act shows that Congress speaks clearly when it intends to authorize prolonged detention with only limited review. Section 1226a(a)(3) authorizes the Attorney General to certify someone as a security threat. Section 1226a(a)(2) specifies that she "shall maintain custody of" such individuals "until the alien is removed." Section 1226a(a)(7) provides for automatic review of those certifications every six months by high-level Department of Justice officials. *See also id.* 1226a(a)(3)-(4) (limiting scheme to national security detainees and constraining delegation of authority), 1226a(a)(6) (authorizing post-order detention beyond six months even where removal is not reasonably foreseeable).

Petitioners' interpretation of Section 1226(c) would render the Patriot Act superfluous. On Petitioners' view, the Government *already* had broader authority to detain individuals as national security threats under Section 1226(c)(1)(D), which applies to individuals charged on national security grounds, than Congress later provided in the Patriot Act.

Compare 8 U.S.C. 1226(c)(1)(D), *with id.* 1226a(a)(3)(A). Moreover, on Petitioners' view, Congress provided *less* authority to detain national security threats under the Patriot Act than those with minor criminal convictions detained under Section 1226(c); the Patriot Act requires periodic supervisory review of prolonged mandatory detentions, whereas Petitioners believe Section 1226(c) authorizes prolonged detention without any review.

As a subsequently-enacted statute that specifically addresses prolonged detention, the Patriot Act provides an important tool for interpreting Section 1226(c).

> At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings . . . . This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000); *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) ("the implications of a statute may be altered by the implications of a later statute").

3. Legislative history does not support Petitioners' claim to unlimited mandatory detention authority. At the time of Section 1226(c)'s passage, detained cases "were given priority in the immigration system," the "average stay [was] 28 days," and the legislation of which it was part sought to further "streamline[]" removal proceedings. H.R. Rep. No. 104-469, pt. 1, at 108, 123. The history nowhere shows that Congress intended to authorize prolonged mandatory detention.

2. This Court's Precedents Establish The Need For An Administrable Six-Month Rule.

The Ninth Circuit also properly applied this Court's precedents adopting administrable rules in other due process contexts to require an IJ hearing after six months. That requirement protects the significant liberty interests at stake and conserves judicial resources. In contrast, Petitioners' approach suffers from severe practical problems evident from the record below and over a decade of experience in the lower courts.

1. This Court often has emphasized the benefits of bright-line rules in ensuring efficient compliance with limits on state authority. It has imposed them even where there are no underlying statutory time limits. *Maryland* v. *Shatzer*, 559 U.S. 98, 110 (2010) (14-day limit in interrogation context because "case-by-case adjudication" would be "impractical"); *Cty. of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-56 (1991) (48-hour limit on detention prior to probable cause hearing "reasonable" to "provide some degree of certainty" that States are acting "within constitutional bounds"); *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363, 372-74 (1971) ("read[ing] explicit time limits" into federal forfeiture statute due to concerns about unconstitutional delays in some cases).[13]

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[13] Even the circuits that rejected a six-month rule acknowledged the uncertainty generated by the lack of guideposts, leading some to suggest alternative time periods. *Chavez-Alvarez*, 783 F.3d at 477 n.11, 478 (between six months and one year); *Sopo*, 825 F.3d at 1217 (by one year); *cf. Reid*, 819 F.3d at 497 (habeas enforcement approach "has resulted in wildly inconsistent determinations"). Respondents have preserved a request for relief other than a six-month rule. J.A.

2. All three Branches have used six months as a guidepost in cases involving prolonged confinement. Congress repeatedly has utilized it in the immigration detention context. 8 U.S.C. 1226a(a)(6), (a)(7), 1537(b)(2)(C). The Executive has done the same. 8 C.F.R. 241.14(k)(1)-(3) (providing for IJ review every six months for specially dangerous post-order detainees whose removal is not significantly likely).

Most important, this Court recognized that time period in *Zadvydas*, which imposed a six-month presumptive limit on detention of individuals ordered removed because "Congress previously doubted the constitutionality of detention for more than six months" in that context. 533 U.S. at 701. This Court also has adopted six months as a "useful benchmark" in other contexts involving confinement. *McNeil*, 407 U.S. at 250 (civil commitment); *Cheff* v. *Schnackenberg*, 384 U.S. 373, 379-80 (1966) (plurality) (six month limit for sentences imposed without jury trial adopted so courts are not "at sea" in applying the rule). Adopting such a rule here would be entirely consistent with *Zadvydas*, which established six months as the triggering point for an *inquiry* into the need for detention, not automatic release. *Compare* Br. 38.

Petitioners claim the Court has rejected bright-line rules in the Speedy Trial context, Br. 42-43 (citing *Barker* v. *Wingo*, 407 U.S. 514 (1972)), but a speedy trial violation results in dismissal of the indictment and *release*. *See Strunk* v. *United States*, 412 U.S. 434, 440 (1973). The question here is when *a hearing* should occur.

41-42; Pet. Opp. To Resp't's 12(c) Mot. For Judg. On The Pleadings 2, 16-18, ECF No. 149.

3. There is no merit to Petitioners' assertion that providing custody hearings to Mandatory Subclass members contravenes Congress' goal of reducing recidivism and flight risk for deportable noncitizens. Br. 32. The injunction permits detention of those who pose such risks. The Ninth Circuit did not order anyone released, set a "cap" on detention beyond six months, Br. 38, or adopt a "one size fits all" approach, Br. 39. It set the time for *a hearing*. A third of Class members—those found to present a risk or cannot post bond—remain detained after the hearing. J.A. 528, fig.1.

Petitioners also ignore the record evidence illustrating that many individuals released through hearings pose no danger. For example, one Class member entered on a valid visa and lived here for seventeen years, during which he established a small business. But he was detained for over two years as a danger, even though his sole conviction was for being under the influence of a controlled substance, for which he received a 90-day sentence suspended to four days (along with a substance abuse program requirement). When he received a custody hearing, the IJ ordered him released on five thousand dollars bond. J.A. 244-46; *see also* J.A. 260-62 (detainee held over two years based on a single marijuana possession offense, released on bond after IJ hearing).[14]

Ignoring this record evidence, Petitioners cite decades-old flight and recidivism data from *Demore*, but that data concerns "deportable criminal aliens," Br. 32, not individuals detained for prolonged periods

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[14] The hearings in these cases were held pursuant to decisions issued prior to *Rodriguez* that required IJ bond hearings under standards similar to those required by *Rodriguez*.

while litigating substantial defenses, who therefore are less likely to present a risk of danger or flight.

Petitioners also ignore substantial changes to the immigration detention system over the last twenty years. Prior to 1996, the Government routinely released individuals or set low bonds to clear bed space, raising concerns in Congress that individuals who might otherwise be detained were released irrespective of danger or flight risk. S. Rep. No. 104-48, at 2 (1995) (INS "often refuse[d]" to take custody over criminal noncitizens "because of limited detention space.").

Since that time, DHS has increased its detention capacity dramatically and, as the record here demonstrates, developed alternatives to detention that have proven effective in preventing danger and flight, reducing the need for detention. For example, the Intensive Supervision Appearance Program (ISAP) employs alternatives such as electronic monitoring that, according to Respondents' own witness, achieve compliance rates approaching 100%. *See* J.A. 564-65 (compliance with ISAP "[is] at, if not close to, 100 percent . . . for people [going] to their immigration court hearing pre-order" in the San Bernardino area, and at 90% for Los Angeles area as a whole); J.A. 380 (in 2010, ISAP's "full service" option produced 99% attendance rate at all hearings and a 94% attendance rate at the final court decision); J.A. 432-33 (in 2011, 99.4% for all hearings and 96% at final decision); J.A. 449 (during 2011, less than 1% of participants in ISAP were terminated due to arrest by another law enforcement agency).

The remainder of Petitioners' arguments regarding danger and flight risk rest on extra-record citations, submitted for the first time to this Court, purportedly demonstrating that "flight and recidivism remain

serious concerns." Br. 33-34. Petitioners had every opportunity to submit information on these points during the two-year discovery period.

The source for Petitioners' assertion that individuals released on bond abscond 41% of the time was rejected as unreliable when Petitioners sought judicial notice of it before the Ninth Circuit. Req. for Judicial Notice Order 6-7, ECF No. 133. That statistic is irrelevant and flawed. It includes the large number of individuals released on bond by DHS without the benefit of custody hearings. It has no bearing on the appearance rates of Class members, who are released only after hearings where IJs are required to consider imposing intensive supervision methods.

The statistic is also flawed. A different study of the same time period that focuses on individuals released after IJ bond hearings shows that 86% of individuals released by IJs appear for proceedings.[15] Even this number, which includes *all* IJ bond hearings, likely underestimates the rate at which Class members appear, given the extremely high success rate of intensive supervision programs. *See* J.A. 380; *see also* App. 53a.

The Court should also disregard Petitioners' extra-record cite to a newspaper article about recidivism. Br. 34. Even without access to the underlying data, Respondents can identify numerous flaws, including that it concerns people released because they could not be repatriated, rather than because they were found at a hearing to present no danger; it is not from a study, but instead the reporter's selection of 323 cases that may not be representative even of that

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[15] TRAC Immigration, *What Happens When Individuals Are Released On Bond In Immigration Court Proceedings?* (Sept. 14, 2016), http://trac.syr.edu/immigration/reports/438/.

group; and it does not define recidivism, and therefore could include people arrested for minor infractions.[16] The Ninth Circuit rejected Petitioners' request for notice of two similar articles on recidivism as unreliable. Req. for Judicial Notice Order 6, ECF No. 133.

The well-developed record below refutes Petitioners' claim that the injunction contravenes Section 1226(c)'s intended purpose.

B. Section 1225(b) Does Not Authorize Subclass Members' Detention.

Only two provisions of Section 1225(b) are at issue here: Sections 1225(b)(1)(B)(ii) and 1225(b)(2)(A). Unlike most individuals subject to detention under Section 1225(b), who face expedited removal under other subsections of Section 1225(b), individuals detained under these two provisions have been referred for full removal proceedings before an IJ. Individuals detained under Section 1225(b)(1)(B)(ii) are asylum seekers who presented themselves at the border *and* were found by an asylum officer to have a credible fear of persecution warranting consideration in a full removal proceeding. Those detained under Section 1225(b)(2)(A) include LPRs returning from brief travel abroad who did not prove their right to admission "beyond doubt" and therefore were referred for removal proceedings.

Neither Section 1225(b)(1)(B)(ii) nor (b)(2)(A) authorizes detention once an individual is in removal proceedings. Both address only the period between

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[16] *See* Maria Sacchetti, *Timeline of the Globe's lawsuit*, Bos. Globe (June 5, 2016), https://www.bostonglobe.com/Bmetro/2016/06/04/timeline-globe-lawsuit/fjfhSlro4lJU0C04ZSKaOM/story.html

apprehension at the border and initiation of removal proceedings. Once proceedings have begun, detention is governed by Section 1226(a), which authorizes detention "pending a decision on whether the alien is to be removed." Regulations implementing that statute permit the IJ to decide whether an individual should be released on bond.

Even if Sections 1225(b)(1)(B)(ii) and 1225(b)(2)(A) were construed to apply during removal proceedings, they are silent as to the permissible length of detention, and therefore do not authorize prolonged detention without hearings.

Treating Arriving Subclass members like other individuals in removal proceedings, including those apprehended after crossing the border without inspection, does not undermine border security. It simply recognizes the distinction Congress already drew between most individuals arriving at the border (who are subject to expedited removal) and the small subset of screened-in asylum seekers and other noncitizens who have been referred for full removal proceedings. Congress did not require such individuals to be subject to arbitrary detention.

1. Section 1225(b) Authorizes Detention Only For The Period Before A Noncitizen Is Placed In Removal Proceedings, After Which Section 1226(a) Governs.

1. The two subsections of Section 1225(b) at issue here—Section 1225(b)(1)(B)(ii) and Section 1225(b)(2)(A)—are parallel provisions that govern detention of noncitizens who present themselves at the border only for the brief period before the initiation of removal proceedings. Individuals screened in and permitted to pursue asylum claims

are detained under Section 1225(b)(1)(B)(ii) "*for* further consideration of the application for asylum." (emphasis added). Likewise, returning LPRs are detained under Section 1225(b)(2)(A) "*for* a [removal proceeding]." (emphasis added). Neither provision governs detention *beyond* that point, i.e., once removal proceedings begin. *See Webster's Third New International Dictionary* 886 (1993) (defining "for" to mean "as a preparation toward . . . or in view of").

In contrast, where Congress intended to authorize detention *pending* completion of proceedings, it said so—including in Section 1225(b)(1)(B)(iii)(IV), which provides "[the] alien . . . shall be *detained pending* a final determination of credible fear of persecution and, if found not to have such a fear, *until removed*." (emphases added).

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken* v. *Holder*, 556 U.S. 418, 430 (2009). This is "particularly true" where, as here, the provisions at issue were "enacted as part of a unified overhaul" of the statute. *Id.* at 430-31.[17]

2. Petitioners' practice of providing custody hearings to individuals who have entered without

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[17] Respondents had no occasion to press this construction below because the Ninth Circuit had already construed Section 1225(b) not to authorize prolonged detention without hearings. App. 90a. In any event, this Court's "traditional practice" is to "refus[e] to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties." *Neese* v. *S. Ry.*, 350 U.S. 77, 78 (1955) (per curiam); *accord Rosenberg* v. *Fleuti*, 374 U.S. 449, 451 (1963).

inspection fatally undermines their construction of Section 1225(b). *See Matter of X-K-*, 23 I&N Dec. at 734. Such individuals are, like Class members, initially detained under Section 1225(b)(1)(B)(ii), because they are classified by statute as applicants for admission. 8 U.S.C. 1225(a)(1), (b)(1)(A)(iii). However, as Petitioners acknowledge, once put in removal proceedings, they become entitled to custody hearings under Section 1226(a) and subject to "the general custody authority of section [1226]." Br. 18 n.5. Because Section 1225(b) does not distinguish between applicants for admission who presented themselves at the border and those who have entered without inspection, it must be construed consistently to provide custody hearings to both groups.

3. Respondents' interpretation better comports with the statute's purpose. To the extent the injunction has any incentive effect on people fleeing persecution, it *encourages* them to present themselves at the border rather than enter without inspection. Furthermore, the injunction has no effect on the vast majority of individuals stopped at the border; they are still summarily returned to their country of origin. It permits release only of the small minority referred for full removal proceedings, detained for six months, and found by an IJ to present no danger or flight risk. Neither Section 1225(b)'s text nor its purpose suggests that Congress intended such individuals to be subject to prolonged arbitrary detention. Instead, once individuals are referred for removal proceedings to resolve their asylum claims or applications for admission, their detention is governed by Section 1226(a). That section, which generally covers detention pending proceedings, permits bond hearings.

4. Petitioners assert that providing custody hearings to Subclass members violates the parole statute, Br. 17, but nothing in its text supports that claim. Section 1182(d)(5)(A) nowhere states that it constitutes the exclusive means of releasing arriving noncitizens, let alone those in removal proceedings. Indeed, habeas courts historically granted release to noncitizens pending exclusion proceedings despite the availability of parole or its precursors. *E.g.*, *Ex parte Joyce*, 212 F. 285, 287 (D. Mass. 1913); *Ex parte Tsuie Shee*, 218 F. 256, 259 (N.D. Cal. 1914); *cf. Gegiow* v. *Uhl*, 239 U.S. 3, 9 (1915) ("[W]hen the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon *habeas corpus*.").

5. Petitioners next argue that Respondents' interpretation contradicts 8 C.F.R. 1003.19(h)(2)(i)(B), which bars IJs from reviewing the custody of "[a]rriving aliens in removal proceedings." Br. 18. If true, the regulation contravenes the statute. Section 1226(a) provides that the "*Attorney General* . . . may continue to detain the arrested alien" or "release the alien on . . . bond . . . or . . . conditional parole." 8 U.S.C. 1226(a)(2) (emphasis added). Although that power is shared with the Secretary of Homeland Security, 6 U.S.C. 202, 251, 291, the Attorney General (under whom IJs work) retains ultimate authority to determine whether to release. 8 U.S.C. 1103(a)(1); *Matter of Garcia-Garcia*, 25 I&N Dec. 93, 97 (BIA 2009). Thus, if the regulation bars IJs from reviewing DHS custody determinations for arriving noncitizens detained under Section 1226(a), it violates the statute. *Cf. Union Pac. R.R.* v. *Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 71 (2009) (an agency "directed by Congress to adjudicate particular

controversies" may not "decline to exercise [jurisdiction]").

Furthermore, this Court owes no deference to agency regulations that raise serious constitutional concerns. *See Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574-75 (1988). The regulation should not be read to give the jailing authority unreviewable power to subject Subclass members to prolonged incarceration. *Cf. Kwong Hai Chew*, 344 U.S. at 598-99, 601-02.[18]

2. Even If Section 1225(b) Governs While Removal Proceedings Are Pending, It Does Not Clearly Authorize Detention Without Hearings Beyond Six Months.

Even if this Court rejects the construction offered above and holds that Section 1225(b)(1)(B)(ii) and (b)(2)(A) continue to govern detention pending removal proceedings, those provisions should not be construed to require prolonged detention without custody hearings.

As set forth above, Arriving Subclass members who are returning LPRs cannot be subjected to prolonged

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[18] Petitioners argue—without substantiation—that the possibility of release after six months undermines the visa and inadmissibility laws and promotes unauthorized employment. Br. 22-24. Nothing in this case implicates the inadmissibility provisions because an individual released from detention is not thereby admitted under the immigration laws. *Cf. Zadvydas*, 533 U.S. at 695. As for employment, Subclass members who seek asylum or who are LPRs may already be eligible to work regardless of detention status, *see* 8 C.F.R. 274a.12(c). If any Arriving Subclass members cannot work upon release, their economic effect is minimal compared to the far larger number of border crossers to whom Petitioners already provide bond hearings.

detention without a custody hearing. Thus, to avoid the constitutional problem, the phrase "shall be detained for [a removal proceeding]" in Section 1225(b)(2)(A) should be read to include an implicit six-month reasonableness limitation for LPRs. *See* App. 40a-45a, 88a-95a.

It follows that the materially identical phrase in Section 1225(b)(1)(B)(ii), which applies to asylum seekers, should be construed consistently. *See Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) ("identical words used in different parts of the same act are intended to have the same meaning"); *see also infra* III.B.[19]

Thus, this Court may avoid the constitutional problem by adopting the Ninth Circuit's construction of Section 1225(b).

III. THE COURT OF APPEALS PROPERLY ORDERED CERTAIN PROTECTIONS AT PROLONGED DETENTION CUSTODY HEARINGS.

For over a century, this Court has construed the immigration statutes to include procedural protections necessary to avoid constitutional problems. *E.g.*, *Yamataya*, 189 U.S. at 101; *Wong Yang Sung*, 339 U.S. at 50. This Court should follow its precedents that "readily construe[] statutes that authorize deprivations of liberty . . . to require that the Government give affected individuals . . . protections

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[19] Petitioners suggest that returning LPRs could be exempt from Section 1225 through a new reading of Section 1101(a)(13), *see* Br. 29 n.9, but their proposal is contrary to the BIA's holding that Section 1101(a)(13) "specifies . . . the circumstances under which a LPR *will* be regarded as seeking an admission." *Matter of Collado-Munoz*, 21 I&N Dec. 1061, 1064 (BIA 1998) (emphasis added)); *see also* App. 44a.

essential to assuring procedural fairness," by reading Section 1226(a) to include certain protections. *Burns* v. *United States*, 501 U.S. 129, 137-38 (1991) (collecting cases).

To satisfy due process requirements, the Ninth Circuit correctly held prolonged detention custody hearings under Section 1226(a) should require (1) the Government to bear the burden of proof by clear and convincing evidence; (2) consideration of the length of detention in determining whether it remains justified; and (3) periodic hearings every six months.

A. Due Process Requires The Government To Justify Prolonged Detention By Clear And Convincing Evidence.

1. Given that prolonged immigration detention constitutes such a significant deprivation of liberty as to require a custody hearing, *see supra* Point I, the Government must bear the burden at that hearing to show, by clear and convincing evidence, why continued detention is justified. When the Government seeks to deprive an individual of a "particularly important individual interest[]," *Addington*, 441 U.S. at 424, it bears the burden of proof by clear and convincing evidence. *Santosky* v. *Kramer*, 455 U.S. 745 (1982) (parental termination); *Addington*, 441 U.S. at 432 (civil commitment); *Woodby* v. *INS*, 385 U.S. 276, 285, 286 (1966) (requiring "clear, unequivocal, and convincing" evidence in deportation cases); *Chaunt* v. *United States*, 364 U.S. 350, 354-55 (1960) (same, for denaturalization).

Where the Court has permitted civil detention, it has relied on the fact that the Government bore the burden of proof at least by clear and convincing evidence. *See*, *e.g.*, *Salerno*, 481 U.S. at 750, 752

("full-blown adversary hearing," requiring "clear and convincing evidence" and "neutral decisionmaker"); *Hendricks*, 521 U.S. at 352-53 (jury trial and proof beyond reasonable doubt). Conversely, this Court has struck down civil detention schemes that place the burden of proof on the detainee. *Foucha*, 504 U.S. at 81-83; *see also Zadvydas*, 533 U.S. at 692 (finding post-final-order custody review procedures deficient because, *inter alia*, they placed burden on detainee).

2. Application of the procedural due process balancing test from *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), further demonstrates that the Government must bear the burden by clear and convincing evidence. The prolonged incarceration suffered by Respondents deprives them of a "particularly important" interest. *Addington*, 441 U.S. at 424; *see also Zadvydas*, 533 US. at 689. To be sure, the Government has an interest in ensuring that noncitizens appear for proceedings and commit no crimes if released. But once detention becomes prolonged—and additional months or years of incarceration loom while removal proceedings continue—the detainee "should not be asked to share equally with society the risk of error [because] the possible injury to the individual is significantly greater than any possible harm to the state." *Addington*, 441 U.S. at 427.

The risk of erroneous deprivation at custody hearings reflects the tremendous power and information imbalance between the federal Government and an incarcerated noncitizen. The Government is represented by attorneys familiar with immigration court procedures, while the noncitizen is by definition detained (sometimes in a remote facility), often unrepresented, and frequently lacking English proficiency. J.A. 304-10; *cf. Santosky*,

455 U.S. at 762-63 (requiring clear and convincing evidence at parental termination proceedings because "numerous factors combine to magnify the risk of erroneous factfinding" including that "parents subject to termination proceedings are often poor, uneducated, or members of minority groups" and "[t]he State's attorney usually will be expert on the issues contested").

Further, detention is not the only alternative available to address concerns about danger and flight risk. The Government may use its ISAP Program, employing alternatives such as electronic monitoring, that has achieved extremely high success rates in ensuring appearance of released detainees. J.A. 380. The Government also may release—through ISAP or on other conditions—individuals with "major ties to the community" and "a question as to removability;" the Government's own witness testified that such individuals pose a "minimal flight risk." J.A. 566-67.

Finally, placing the burden on the Government imposes minimal inconvenience. DHS has electronic access to numerous enforcement databases and the noncitizen's "A file" (which it maintains, and which contains all immigration records), which it can use to make its case for continued detention. And the additional procedures that Respondents seek have saved the Government millions of dollars in detention costs since they were implemented as a result of this litigation. J.A. 529, fig.2; J.A. 88-89, tbl.18.

3. Petitioners counter that they need only show a "facially legitimate and bona fide" basis for detention under the plenary power doctrine. *See* Br. 54 (citing *Fiallo* v. *Bell*, 430 U.S. 787, 794-95 (1977)). But this Court does not employ such a deferential standard where prolonged detention is at stake. The cases Petitioners cite, Br. 54, did not consider the

constitutional problems posed by prolonged detention, much less the burden required to justify it. *Cf. Zadvydas*, 533 U.S. at 695 (plenary power "subject to important constitutional limitations").

4. Requiring the Government to bear the burden by clear and convincing evidence is not "unambiguously foreclose[d]," by Section 1226(c)(2), former INA 306(a)(4), Section 1225(b)(2)(A) or any other provision. Br. 52. None of the provisions Petitioners cite pertain to prolonged detention. Likewise, Petitioners suggest, Br. 51, that placing the burden on the Government is "fundamentally inconsistent" with the statutory scheme governing admission, but here too the provisions it cites—8 U.S.C. 1225(b)(2)(A) and 1229a(c)(2)—do not govern prolonged detention. *See supra* Point II.

The regulations Petitioners cite at 8 C.F.R. 1236.1, also do not address prolonged detention. If they did, they would raise serious constitutional problems, and therefore are not entitled to *Chevron* deference. *See Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *Edward J. DeBartolo Corp.*, 485 U.S. at 574-75, 588. In any event, "the degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve.'" *Santosky*, 455 U.S. at 755-56 (quoting *Woodby*, 385 U.S. at 284).[20]

Contrary to Petitioners' assertion, *Zadvydas* supports these safeguards. Br. 53. *Zadvydas* criticized, on due process grounds, "administrative proceedings where the alien bears the burden of

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[20] *Demore* counsel's statement in oral argument about burdens of proof, Br. 53, similarly did not address prolonged detention.

proving he is not dangerous, without (in the Government's view) significant later judicial review." 533 U.S. at 692. While it also discussed habeas proceedings, it recognized that what is required in habeas is distinct from the protections necessary in agency proceedings when the Government seeks to impose prolonged detention.

It strains credulity for Petitioners to argue that they suffer an "information asymmetry" as to Arriving Subclass members—often asylum seekers who are indigent and unrepresented—who have been incarcerated for six months. Br. 51. DHS has access not only to the "A file" and other law enforcement records, but also to State Department, Department of Defense, intelligence, and international (including INTERPOL) databases on a real-time basis, including through biometric fingerprinting.[21] DHS already verifies asylum-seekers' identity as part of the application process, 8 U.S.C. 1158(d)(5)(A)(i) (requiring identity check). An individual whose identity is unknown cannot win asylum and would therefore be a flight risk. *Matter of O-D-*, 21 I&N Dec. 1079, 1082 (BIA 1998).

In any event, these arguments do not apply to Class members who are not arriving noncitizens, and if the Court construes Section 1226(a) to require the Government to bear the burden of proof in prolonged detention custody hearings, that construction must apply equally to individuals seeking admission and

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[21] *See* DHS, *Privacy Impact Assessment for the TECS System: CBP Primary and Secondary Processing* 9-10 (Dec. 22, 2010), https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_tecs.pdf; DHS, *Privacy Impact Assessment for the Automated Biometric Identification System (IDENT)* 3-5 (Dec. 7, 2012), https://www.dhs.gov/sites/default/files/publications/privacy-pia-nppd-ident-06252013.pdf.

others detained beyond six months. *See generally Clark*, 543 U.S. at 378-79, 383 (applying construction of detention statute necessary, per *Zadvydas*, to avoid constitutional problem as to admitted noncitizens "without differentiation to all . . . categories of aliens that are its subject" including "nonadmitted aliens").

Finally, the operation of prolonged detention custody hearings after the injunctions illustrates that, contrary to Petitioners' suggestion, the burden of proof here does not create "a presumptive entitlement to be released." Br. 15. Even where the Government has borne the burden of proof by clear and convincing evidence, it has defeated bond in 30% of cases and 30% of those ordered released on bond remained in detention because they could not afford the bond. *See* J.A. 529, fig.2.

B. Immigration Judges Must Consider Length Of Detention At Prolonged Detention Custody Hearings, And Must Conduct Them Periodically.

This Court's focus on detention length in both *Demore* and *Zadvydas* demonstrates why the length of past detention must be considered as a factor at custody hearings, and why hearings must occur every six months. A three-year detention constitutes a greater deprivation of liberty than one of six months, and accordingly demands greater justification. *Accord* Br. 47 (acknowledging that "as the passage of [detention] time increases a court may scrutinize the fit between the means and the ends more closely") (citing *Zadvydas*, 533 U.S. at 690).

For those who remain detained for months or years after an initial hearing, the additional deprivation requires greater justification, and therefore also requires periodic hearings to assess whether

detention remains reasonable in relation to its purpose. *See Mathews*, 424 U.S. at 335 (greater procedural protections required when the private interests at stake are weightier).

1. This Court has recognized the importance of periodic hearings, holding that "[a] confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation." *McNeil*, 407 U.S. at 249. In *Jackson* v. *Indiana*, the Court found lengthy pre-trial detention of incompetent criminal defendants unconstitutional where "[t]here is no statutory provision for periodic review of the defendant's condition." 406 U.S. at 720.

2. Applying the *Mathews* factors confirms the need to consider length of detention. It is undisputed that many Class members are incarcerated for far longer than six months, and that they face lengthy future periods of detention. More than half of Class members detained past six months were still detained at 12 months; 23% of them were still detained at 18 months; and 10% were still detained at 24 months. J.A. 74-75 & tbl.4; App. 18a-19a. Lead Plaintiff Alejandro Rodriguez was detained for more than three years and three months, and would have been detained more than seven years if not for this case, due to Petitioners' erroneous interpretation of the immigration laws. *See* J.A. 257-60.

The record establishes that Class members face a substantial risk of erroneous deprivation absent periodic hearings that consider detention length. Class members denied a hearing prior to the injunction received at most a paper review, such as the parole process described above. Those reviews were replete with procedural deficiencies, including lack of notice and failure to provide translation, and resulted in unjustified prolonged detention. J.A. 225-

69; App. 39a-40a. The risk of erroneous deprivation was amplified because, as the Ninth Circuit found, "[d]etainees, who typically have no choice but to proceed *pro se*, have limited access to legal resources, often lack English-language proficiency, and are sometimes illiterate." App. 48a; *see also* App. 143a (finding that the "bond hearing process would be fraught with peril if the Court were to place the burden on detainees to request a bond hearing").

For example, DHS initially denied release to an Arriving Subclass member, a Somali refugee, based on its assessment that he did not have a sponsor with whom he could live. Two months later, in his asylum application, he submitted a declaration from an American citizen family friend who pledged to house and assist him. But because there was no periodic review, he remained detained for an additional *year*. He obtained release only after prevailing on his asylum claim before the IJ. J.A. 227-29.

Finally, conducting periodic hearings imposes minimal costs. Petitioners stipulated below that "the cost of providing a bond hearing should [not] be considered in this case as a factor weighing in [their] favor." J.A. 588. Petitioners already conduct numerous bond hearings; they are typically brief (ten to fifteen minutes) and sometimes via video conference. *See* J.A. 573. And because detention costs dwarf supervision costs, Mot. for Summ. J. 20-21, ECF No. 281, hearings for Class members have saved millions of dollars. J.A. 529, fig.2; J.A. 88-89, tbl.18.

3. It is no surprise that the immigration statute and regulations are silent as to periodic hearings and consideration of detention length, Br. 54-55, because these requirements apply only once detention becomes prolonged. *Compare* 8 C.F.R. 241.14(k)(1)-(3) (providing for IJ review every six months for specially

dangerous post-order detainees whose removal is not significantly likely). For the same reason, Petitioners' reliance on *Chevron* deference and the plenary power doctrine, Br. 54-55, is misplaced. Neither doctrine governs when, as here, detention is prolonged and raises serious constitutional problems.

Nor are *Mathews'* requirements satisfied by a Class member's right, under 8 C.F.R. 1003.19(e), to request additional custody hearings based on "changed circumstances." Br. 54-55. Because the agency does not count additional time in detention as a "changed circumstance," a detainee cannot obtain a new custody hearing based on the passage of time. J.A. 317. On Petitioners' view, a Class member who received a custody hearing at six months could be subjected to years of additional detention with no ability to secure another hearing. *See* App. 47a (citing example of asylum seeker detained for nearly four years). The record establishes that requiring detainees to affirmatively request hearings does not ensure meaningful access to detention review. J.A. 523-24.

Petitioners mistakenly analogize to the Bail Reform Act, Br. 55, but pretrial detention in criminal cases is generally subject to the "stringent time limitations of the Speedy Trial Act." *Salerno*, 481 U.S. at 747; *see* 18 U.S.C. 3161(c)(1) (requiring criminal trial to begin within seventy days of indictment). Indeed, even though the Act does not mention length of detention, when courts have considered *prolonged* pretrial detention, they have required consideration of additional factors "such as the length of the detention." *United States* v. *Hare*, 873 F.2d 796, 801 (5th Cir. 1989); *see also United States* v. *Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988) (per curiam).

CONCLUSION

For these reasons, this Court should affirm the decision below.

Respectfully submitted,

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