No. 15-1204

In the Supreme Court of the United States

DAVID JENNINGS, ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ, ET AL.,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

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

SUPPLEMENTAL REPLY BRIEF FOR THE PETITIONERS

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The Due Process Clause does not mandate the rigid, one-size-fits-all rule respondents advocate. Indeed, an inflexible six-month mandate that is blind to the wide variation in the statutory contexts here—and blind to the countless reasons why removal proceedings may be longer or shorter for a particular alien—is contrary to the fundamental notion that "[t]he constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances." *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982). A rigid yardstick would be particularly inappropriate for measuring the constitutionality of detention that is incident to removal proceedings, because the constitutionality of ongoing detention must be determined with reference to the reasons why the proceedings themselves remain ongoing. As this Court recognized in the context of the

Speedy Trial Clause, a court "cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate," *Barker* v. *Wingo*, 407 U.S. 514, 521 (1972), and a rigid six-month deadline "would require this Court to engage in legislative or rulemaking activity," *id.* at 523. See *Plasencia*, 459 U.S. at 34-35.

Respondents assert (Supp. Br. 12) that, "[o]utside the national security context, this Court has never authorized civil detention beyond six months without an individual hearing." But this Court has upheld detention beyond six months outside that context, including in *Demore* v. *Kim*, 538 U.S. 510 (2003), which forecloses respondents' position as to 8 U.S.C. 1226(c). This Court's decisions also foreclose such a mandate for aliens seeking initial admission and detained under 8 U.S.C. 1225(b). "This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Plasencia*, 459 U.S. at 32. And aliens detained under that provision are provided significant process. In particular, arriving aliens who seek asylum or claim a fear of persecution or torture have credible-fear screening, removal proceedings before an immigration judge (IJ), appellate review, and individualized consideration for release on parole if the alien demonstrates he is not a flight risk or danger. Whatever due process might require, this framework is more than sufficient—and in all events, there is no basis for a rigid six-month mandate.

This Court therefore should reverse the judgment of the court of appeals and remand with instructions to enter judgment in the government's favor. The only common question holding this class action together

was whether the government must provide bond hearings to all class members at the six-month mark. The answer to that question is no.

I. The Constitution Does Not Require Bond Hearings Whenever Removal Proceedings (And Detention Incident Thereto Under Section 1225(b)) Last Six Months

A. The Constitution Does Not Require Bond Hearings After Six Months For Aliens Seeking Initial Admission

As the Ninth Circuit recognized, Section 1225(b) is "clearly" constitutional as applied to aliens seeking initial admission. Pet. App. 86a. "This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Plasencia*, 459 U.S. at 32. And aliens seeking admission who are detained under Section 1225(b) enjoy many protections in removal proceedings and may be released on parole. See Gov't Supp. Br. 7-17. There is accordingly no basis for upending fundamental tenets of national sovereignty and holding that, unless the government can complete removal proceedings in six months, *every* alien seeking admission has a presumptive constitutional entitlement to be released into the United States.

1. Respondents cannot distinguish this Court's precedents—and *a fortiori* cannot justify an arbitrary six-month cap in light of the extensive procedural protections available here. They contend (Supp. Br. 22) that *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), should be limited to national-security cases. But "[t]he distinction between an alien who has effected an entry into the United States and one who

has never entered runs throughout immigration law," *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001), not merely to rare cases involving sensitive national-security information.[1]

Respondents contend (Supp. Br. 20-21) that *Zadvydas* supports their proposed constitutional limit on detention to effectuate exclusion. But *Zadvydas* involved "aliens who were admitted to the United States but subsequently ordered removed" yet could not actually be removed. 533 U.S. at 682. As the Court explained, "[a]liens who have not yet gained initial admission to this country *would present a very different question*." *Ibid.* (emphasis added).

Respondents contend (Supp. Br. 20) that they "seek procedures as to their detention rather than their admission." But a bond hearing for an alien seeking admission would relate to *both* detention *and* the alien's continued exclusion, because the IJ would decide whether to release the alien from detention *into the United States*. And *Mezei* rejected "both" the alien's "challenge to the procedures by which he was deemed excludable" and "his challenge to continued detention." *Zadvydas*, 533 U.S. at 694; see *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441, 1449-1450 (9th Cir.) (en banc) (*Mezei*'s "holding necessarily included a determination that Mezei's *detention* was legal as well."), cert. denied, 516 U.S. 976 (1995). Indeed, on the detention question,

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[1] The injunction here also encompasses aliens who present national-security concerns. The class definition excludes aliens detained under two national-security statutes, 8 U.S.C. 1226a, 1537, but an alien who presents national-security concerns could be detained under Section 1225(b) or 1226(c). Pet. App. 139a-140a; see 8 U.S.C. 1182(a)(3), 1227(a)(4) (grounds of inadmissibility and deportability related to national security).

Mezei was unanimous. *E.g.*, 345 U.S. at 222 (Jackson, J., dissenting) ("Due process does not invest any alien with a right to enter the United States.").

2. Respondents focus on the subcategory of aliens arriving at a port of entry who lack valid documentation or seek to enter via fraud, and who would be removed via expedited removal (ER) except that they have been found to have a credible fear of persecution or torture. 8 C.F.R. 208.30(e)(5), 235.6(a)(1)(ii) and (iii); see 8 U.S.C. 1225(b)(1)(B)(ii). Respondents contend (Supp. Br. 23) that this subcategory is differently situated because they have been "screened in for full removal proceedings." But they remain inadmissible and have never been "admitted," which means "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A). And Congress did not confer on them a protected liberty interest supporting their release. See *Kentucky Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 460 (1989) ("[A]n individual claiming a protected interest must have a legitimate claim of entitlement to it."). To the contrary, Congress provided that an alien found to have a credible fear "*shall be detained* for further consideration" of his asylum claim, 8 U.S.C. 1225(b)(1)(B)(ii) (emphasis added), and may be released only through the Secretary of Homeland Security's *discretionary* parole authority under 8 U.S.C. 1182(d)(5). Cf. *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 756 (2005) ("[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.").

Even if aliens in this subcategory nonetheless could claim some due process interest in seeking release into the United States, the existing framework provides

more than sufficient process. If their claim is deemed credible by an asylum officer (or by an IJ), regulations require that they be placed in IJ removal proceedings with the notice and opportunity to be heard that the *Mezei* dissenters viewed as sufficient; if the IJ denies their claim and orders them removed, they have access to appellate review; their detention is inherently temporary, not open-ended; and the government expedites proceedings to minimize that temporary detention. See Gov't Supp. Br. 22-24.

Furthermore, every studied subclass member remained in custody pursuant to an individualized determination that release on parole was unwarranted. See J.A. 91 (identifying studied subclass members based on a parole worksheet). The government's policy is to automatically consider parole for arriving aliens found to have a credible fear, and to release the alien if he establishes his identity, demonstrates that he is not a flight risk or danger, and there are no countervailing considerations. J.A. 48-50.[2] The policy calls for far more than "checking a box on a form, with no hearing, no record, and no appeal." Resps. Supp. Br. 27. It provides for notice to the alien, an interview, the opportunity to respond and present evidence, a custody de-

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[2] This policy remains in "full force and effect." Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* 10 (Feb. 20, 2017) (Kelly Mem.). The Secretary's memorandum reiterates that the burden "remains on the individual alien" and that U.S. Immigration and Customs Enforcement (ICE) "retains ultimate discretion whether it grants parole in a particular case." *Ibid.* It also states that the policy is subject to "further review and evaluation of the impact of operational changes" to implement Executive Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017). Kelly Mem. 9.

termination by an officer who did not conduct the credible-fear screening, supervisory review, and further parole consideration based upon changed circumstances or new evidence. J.A. 48-50. That is ample procedure on the issue of release during proceedings. Cf. Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1278-1281 (1975). There is also good reason for Department of Homeland Security officials, not IJs, to make this determination: The Secretary has the "power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens." 8 U.S.C. 1103(a)(5); see 6 U.S.C. 202 (Secretary's responsibilities include "[p]reventing the entry of terrorists," "[s]ecuring the borders," and establishing rules governing parole).

Unlike studied class members overall (who were usually ordered removed), about two-thirds of studied aliens identified to be in the Section 1225(b) subclass obtained asylum or other relief. J.A. 98, 100 (42 of 66 completed cases). But the government has disputed that the statistics derived from this small sample are representative nationwide, see 12-56734 Gov't C.A. Br. 10, and in any event they would provide no basis for respondents' sweeping facial challenge. It is fully consistent with due process to temporarily detain an arriving alien during proceedings to determine whether he will be permitted to enter the United States, when he has failed to establish his identity or has failed to show that he will not be a flight risk or danger. See 8 U.S.C. 1182(d)(5); 8 C.F.R. 212.5(b); J.A. 48-50. As the Court put it "more than a century ago," removal proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true

character." *Demore*, 538 U.S. at 523 (quoting *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896)).

3. In any event, even if in an extraordinary circumstance the Due Process Clause could potentially require an IJ bond hearing for an alien seeking initial admission—and possible release into the United States notwithstanding the contrary judgment of the Secretary—that would not remotely justify an across-the-board six-month limit. See pp. 1-2, *supra*. Indeed, constitutionalizing such an arbitrary deadline would not only contravene longstanding and fundamental principles of national sovereignty, but also would seriously impair the ability of Congress and the Executive to respond to a mass influx of aliens at the borders. See *Jean* v. *Nelson*, 472 U.S. 846, 848-849 (1985) (Haitian migrants); *Garcia-Mir* v. *Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985) (per curiam) (Mariel Cubans), cert. denied, 475 U.S. 1022 (1986). It would create a powerful incentive for aliens seeking to enter to prolong their proceedings to achieve the six-month mark and potential release on bond. Flight for aliens in this subcategory is also particularly problematic, because an inadmissible arriving alien who absconds would unlawfully appropriate something similar to asylum itself: the ability to enter and be at large inside the United States.

B. The Constitution Does Not Require Bond Hearings After Six Months In Rare Cases Involving LPRs

A lawful permanent resident (LPR) returning from abroad generally has a protected due process interest in connection with his ability to reenter the United States. *Plasencia*, 459 U.S. at 34. Congress has robustly protected that interest, however, by providing that an LPR "shall not be regarded as seeking an admission"—and thus shall not be subject to detention under

Section 1225(b)(2)(A)—outside of six narrow circumstances. 8 U.S.C. 1101(a)(13)(C). The detention of an LPR under Section 1225(b) is thus, by definition, an exceptional circumstance. And even then, the application of Section 1101(a)(13)(C) will virtually always be constitutional: The exceptions in that provision involve aliens who have forfeited their LPR status and criminal aliens for whom constitutionality follows *a fortiori* from *Demore*. *Ibid.*; see Gov't Supp. Br. 25-26.

The appropriate mechanism for addressing an extraordinary case involving a returning LPR is thus an as-applied challenge focusing on its extraordinary facts. That possibility does not justify an across-the board limit governing every LPR, regardless of circumstances. And it would be manifestly improper to extend that rule to non-LPRs detained under Section 1225(b)(2)(A), a category respondents ignore—much less to aliens detained under Section 1225(b)(1)(B)(ii), which *never* applies to LPRs.

II. The Constitution Does Not Require Bond Hearings Whenever Removal Proceedings For Criminal Aliens (And Detention Incident Thereto Under Section 1226(c)) Last Six Months

A. This Court's Precedents Foreclose A Six-Month Rule

1. Respondents claim (Supp. Br. 12) that, "[o]utside the national security context, this Court has never authorized civil detention beyond six months without an individual hearing." But *Demore* and *Zadvydas* authorized just that. *Demore* upheld the detention of an LPR (Kim) who had already been detained pending removal proceedings for 197 days, who was subject to further detention following this Court's decision, whose removal hearing had not yet been held because he sought

a continuance, and who could later appeal. Gov't Br. 35-36 & n.11; see Am. Immigration Council et al. Amicus Br. 8 n.4 (asserting that Kim was detained ten more months). *Demore* thus squarely forecloses respondents' position.

Zadvydas also authorized detention for more than six months without an individual hearing, albeit after entry of a removal order. Even after the six-month "presumptively reasonable" period the Court identified as a statutory matter, there was no requirement of a hearing. 533 U.S. at 701. Rather, the government could continue to detain the alien unless and until he provided good reason to believe that there was no significant likelihood of removal in the reasonably foreseeable future. *Ibid.*; see also 8 U.S.C. 1231(a)(1)(C) (extending 90-day removal period "if the alien fails or refuses to make timely application in good faith" for travel documents "or conspires or acts to prevent the alien's removal").[3]

Furthermore, a rigid six-month mandate is fundamentally inconsistent with the flexibility inherent in due process. See pp. 1-2, *supra*. Even as a statutory matter, most circuits to address Section 1226(c) have rejected a six-month cap. See Gov't Supp. Br. 46. In the criminal context, this Court squarely rejected a six-month cap under the Speedy Trial Clause, holding that a court "cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate." *Barker*, 407 U.S. at 521. And lower courts have conducted a case-specific inquiry for as-applied challenges to continued pretrial detention, and have

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[3] *Mezei* upheld detention to effectuate exclusion for far longer than six months, albeit in the context of an alien seeking initial admission. See 345 U.S. at 208-216.

repeatedly upheld detention well beyond six months. See Gov't Supp. Br. 39-41 (collecting cases).

2. Respondents cannot justify departing so radically from the principles those decisions embody, especially given Congress's broad powers over immigration. Respondents assert (Supp. Br. 30) that subclass members "are detained for periods far longer than those the Court considered in *Demore*." But many (if not most) class members were released in periods that the Court could have reasonably foreseen for Kim himself or for others who seek relief, continuances, and possibly appeal. See J.A. 188 (44.3% of in-period class members released by 9 months, 67% by 12 months, and 84.1% by 16 months).[4]

Respondents again assert (Supp. Br. 33-35 & n.10) that this case does not involve "deportable" aliens and that many class members have "substantial defenses to removal." As the government previously explained (Merits Reply Br. 12-15), those asserted distinctions do not hold up. Virtually all of the studied subclass members with completed cases were found deportable or inadmissible. Gov't Supp. Br. 35-36. Moreover, Kim himself sought relief from removal and claimed that his request was a "substantial question not for purposes of delay." *Demore* Oral Arg. Tr. 42.

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[4] The government's expert did not agree that his methodology "significantly skew[ed] average detention lengths." Resps. Supp. Br. 31 n.9. He selected "in-period" aliens to correct for a selection bias and thus make the figures more representative, not less. J.A. 140-143. He was unable to continue tracking aliens who remained in detention at the end of the study period, but he stated that this had "no effect on the medians and very little effect on many of the other statistics" because such a small portion of the sample were still detained at that point. J.A. 172.

There is no merit to respondents' assertion that 74% of subclass members (Supp. Br. 34 n.10)—not 97%, as they previously claimed, Br. 20 n.5, 28—raise "substantial" defenses. The record shows that 70% of subclass members *filed* for relief from removal, J.A. 95-96, not that they were all "eligible" or had "substantial" claims for relief, as respondents claim (Supp. Br. 34 n.10). An alien may apply for relief even if he is ultimately found ineligible. 8 C.F.R. 1240.11(e). Although the record does not indicate how many were eligible, it shows that nearly two-thirds were denied. See Gov't Supp. Br. 42.[5]

Respondents again tout (Supp. Br. 36-37) monitoring programs to combat flight. But "monitoring mechanisms which can be employed as viable alternatives to detention" existed at the time of *Demore*. 538 U.S. at 555 n.10 (Souter, J., concurring in part and dissenting in part) (citation omitted). And respondents' figures are unrepresentative, because criminal aliens subject to mandatory detention are not included in such programs. Gov't Merits Reply Br. 16.

B. The Cases Respondents Rely On Are Inapposite

The cases respondents rely upon to support a rigid six-month test are clearly inapposite. First, it is immaterial that the Sixth Amendment guarantees a "trial by jury where imprisonment for more than six months is authorized." *Baldwin* v. *New York*, 399 U.S. 66, 69 (1970) (opinion of White, J.); *id.* at 74-76 (Black, J.,

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[5] The record similarly does not show that "[m]ore than half" "lawfully resided here for seven years, with at least five years as an LPR, and with no aggravated felony convictions." Resps. Supp. Br. 44. Those are the eligibility requirements for an LPR to obtain cancellation of removal, 8 U.S.C. 1229b(a), but the record does not indicate what portion were eligible.

concurring in the judgment). This case involves the Due Process Clause, not the Sixth Amendment, and the jury-trial rule is grounded in the definition of "petty offenses" dating back to "the late 18th century." *Id.* at 70-71 (opinion of White, J.). By contrast, respondents' six-month cap is entirely novel and foreclosed by *Demore*. A "petty offense" is also amenable to bright-line definition because imprisonment is a freestanding penalty. Detention incident to removal proceedings, by contrast, is not punitive, and its length is necessarily tied to the length of the removal proceedings themselves, which can vary considerably depending on many contingencies.

This case is also fundamentally different from the "certainly unusual" situations where this Court has imposed clear deadlines as a matter of due process. *Maryland* v. *Shatzer*, 559 U.S. 98, 110 (2010); see *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-57 (1991). *Shatzer* and *McLaughlin* involved periods that were so short that case-by-case adjudication was "impractical." *Shatzer*, 559 U.S. at 110 (14 days); see *McLaughlin*, 500 U.S. at 55-57 (48 hours). By contrast, as *Demore*, *Barker*, and the many cases sustaining pretrial criminal detention for longer than six months illustrate, case-by-case adjudication is properly tailored and workable here. Moreover, the State could largely control the timing of the custodial interrogation in *Shatzer*, 559 U.S. at 110, and the *Gerstein* hearing in *McLaughlin*, 500 U.S. at 56. By contrast, although the government expedites proceedings for detained aliens to minimize their duration, the duration varies largely due to the alien's own litigation choices to seek relief and otherwise take advantage of the afforded procedures.

Finally, *McNeil* v. *Director*, 407 U.S. 245 (1972), does not support constitutionalizing a six-month cap. That case involved a freestanding regime for the indefinite commitment of the mentally ill, and is inapposite for the same reasons as *Foucha* v. *Louisiana*, 504 U.S. 71 (1992), and *Addington* v. *Texas*, 441 U.S. 418 (1979). See Gov't Supp. Br. 33-35. Also, in *McNeil*, the Court identified six months as "a useful benchmark" because the underlying statute "limit[ed] the observation period to a maximum of six months," subject to renewal, suggesting an "initial legislative judgment" about an appropriate period. 407 U.S. at 250. In Section 1226(c), by contrast, Congress made a different legislative judgment: "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers," Congress mandated detention of covered criminal aliens until removal proceedings are completed. *Demore*, 538 U.S. at 513.

C. A Six-Month Rule Would Be Vastly Overbroad And Would Cause Serious Practical Problems

1. Respondents contend (Supp. Br. 44) that the Court should make six months the arbitrary outer limit because it would be unrealistic for "all of these individuals" to file habeas cases. But that begs the question by assuming that "all of these individuals" would have a viable claim at or soon after the six-month mark. That assumption is unfounded. Under *Demore*, Section 1226(c) is constitutional in virtually all of its applications, including when removal proceedings last beyond the six-month mark. Conversely, a six-month mandate would be arbitrary and radically overbroad. Indeed, it would cause the very problems of flight and recidivism that Congress enacted Section

1226(c) to prevent—notwithstanding that, under the proper case-specific due process analysis that takes into account the reasons for the duration of the proceedings, detention would be constitutional in the vast majority of cases. See Gov't Supp. Br. 42-45.

A fixed time limit would also create a powerful incentive for criminal aliens to prolong their removal proceedings in the hope of obtaining the release that Congress foreclosed. Respondents contend (Supp. Br. 47) that "[n]o evidence supports th[e] claim" that a six-month rule encourages criminal aliens to prolong their proceedings. But there is no record evidence on this point either way, and the incentive is clear: The prospects of being granted bond at six months (more than two-thirds) are substantially higher than the prospects of obtaining relief via litigation (about one third). Gov't Supp. Br. 43; cf. *Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting) ("[C]ourt ordered release cannot help but encourage dilatory and obstructive tactics.").

2. The government agrees that detention must always "remain[] reasonably related to its purpose." Resps. Supp. Br. 48. But nothing about the six-month mark establishes that there has been unreasonable government delay or that Congress's categorical judgment of flight risk and dangerousness, which the Court upheld in *Demore*, has ceased to be valid. See 538 U.S. at 531. To the contrary, the government's interests in preventing flight and recidivism will virtually always justify detention of a criminal alien for the full duration of his removal proceedings. Gov't Supp. Br. 31-35. The government expedites removal proceedings for detained aliens to minimize their duration. *Id.* at 14-15. And the record indicates that sub-

stantial periods elapsed for class members not because of government-created delay, but because removable criminal aliens chose to seek continuances, relief from removal, and appellate review, notwithstanding that detention was mandatory when they did so. Those choices may entail "difficult judgments," but the Court in *Demore* made clear that continued detention of those who make them is not unconstitutional. 538 U.S. at 530 n.14 (citation omitted).

Choices to seek continuances, relief from removal, appellate review by the Board of Immigration Appeals (BIA), or to petition for judicial review (and a stay of removal) necessarily extend proceedings—and thus necessarily extend the detention needed to prevent criminal aliens from fleeing or committing further crimes in the interim. Gov't. Supp. Br. 41-42. In the end, moreover, virtually all criminal aliens in the class were found removable and about two-thirds were ordered removed. *Id.* at 42. And if the alien lost before the IJ, he was exceedingly unlikely to prevail before the BIA or a court of appeals. *Ibid.* That further weakens respondents' suggestion (Supp. Br. 31, 48) that the Constitution requires a bond hearing when detention is extended because the alien has chosen to appeal. Congress also had ample support for concluding that, if such criminal aliens are released, flight and recidivism will be significant concerns. Gov't Supp. Br. 42-45. The purpose of mandatory detention—to prevent flight and recidivism by criminal aliens—would be thwarted if a criminal alien could unilaterally ensure that his removal proceedings last six months, and then be rewarded with the very real possibility of release that Congress enacted Section 1226(c) to prevent.

3. Section 1226(c) unambiguously prohibits bond hearings and general due process principles and *Demore* foreclose a flat six-month rule. To be sure, outlier cases could arise in which the proceedings, and accompanying detention, become unjustifiably prolonged. In that event, an as-applied challenge to continued detention could be brought in an individual habeas action. This Court could, however, provide some guideposts for federal courts to readily identify and address outlier cases in as-applied challenges.

First, in some cases, the length of time could itself indicate that closer scrutiny is warranted. The record indicates that a detained case is a statistical outlier (the longest decile in this class) if the IJ stage has lasted about 14 months, or if the IJ and BIA stage together have lasted about 20 months. Gov't Merits Reply Br. 21. Such passage of time would not necessarily indicate that mandatory detention has become unconstitutional, but could fairly prompt an occasion for review of the reasons why proceedings remain ongoing.

Second, in assessing whether there is a legitimate basis for the proceedings and resulting detention to remain ongoing, a court could look by analogy to the sorts of reasons why periods of time are excluded under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* That Act starts with a baseline of 70 days for a trial to commence, 18 U.S.C. 3161(c)(1), then excludes various periods, 18 U.S.C. 3161(h). Although some exclusions have no analogy in removal proceedings (and some aspects of removal proceedings have no analogy in the Speedy Trial Act), for many the analogy is clear. For example, a habeas court entertaining an as-applied challenge to detention under Section 1226(c) could generally exclude from the calculus: (1) any peri-

od resulting from continuances, 18 U.S.C. 3161(h)(7);[6] (2) any period resulting from the unavailability of an essential witness, 18 U.S.C. 3161(h)(3)(A); (3) any period "resulting from other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1), such as interviews or a background check to support an application for discretionary or other relief from removal; (4) any period needed for prompt disposition of a motion, 18 U.S.C. 3161(h)(1)(D); (5) "delay reasonably attributable to any period, not to exceed thirty days, during which" a motion "is actually under advisement by the [IJ]," 18 U.S.C. 3161(h)(1)(H); and (6) delay resulting from an appeal to the BIA, 18 U.S.C. 3161(h)(1)(C) (excluding delay from interlocutory appeals).[7]

This approach would provide an administrable basis for confirming in most cases that removal proceedings remain ongoing for good reason, and thus that mandatory detention to prevent flight or recidivism remains justified by those immigration purposes. In particular, this approach would account for the reasonable impact of many significant litigation choices by detained criminal aliens. Conversely, under this approach, if the duration of removal proceedings has extended substantially beyond what could reasonably be expected for similar cases, a court could assess more closely the reasons why proceedings have not yet been completed and whether they have been unreasonably or pointless-

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[6] Continuances are granted only for good cause, 8 C.F.R. 1003.29, and ICE policy is to request them in detained cases only when absolutely necessary, Gov't Supp. Br. 14.

[7] Courts should also exclude the time that elapses if the alien files a petition for review of a final order of removal from the BIA, especially if the alien obtains a stay of removal rather than litigating from abroad. See Gov't Supp. Br. 13.

ly delayed—including whether the alien has sought to expedite proceedings when they have become delayed. Cf. *Barker*, 407 U.S. at 528. In all events, however, the Constitution does not impose the flat six-month mandate respondents advocate.

III. The Constitution Does Not Require The Government To Conduct Bond Hearings Automatically Every Six Months, To Bear The Burden Of Proof (Much Less By Clear-And-Convincing Evidence), Or To Revise The Bond Factors

A. The Constitution Does Not Require Automatic Periodic Hearings For Aliens Denied Bond Or Who Fail To Post Bond

As set forth above, the Constitution does not require the government to provide bond hearings whenever removal proceedings—and incident detention of an alien seeking admission under Section 1225(b) or a criminal alien under Section 1226(c)—last six months. It follows *a fortiori* that the Constitution does not require bond hearings every six months for aliens detained under Section 1226(a), who have already had an individualized bond hearing and can obtain another if circumstances change materially. 8 C.F.R. 236.1(d)(1), 1003.19(e), 1236.1(d)(1).

Respondents contend that this scheme is facially unconstitutional and that the government must conduct bond hearings every six months, automatically, even when an alien detained under Section 1226(a) has not asked for a new hearing or circumstances have not materially changed. In urging that dramatic revision of longstanding procedures, they cite no case that has ever mandated automatic periodic hearings. Instead, they rely (Supp. Br. 56) on *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). But that case reaffirms that "due pro-

cess is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334. Respondents also assert that a "confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation." Resps. Supp. Br. 56 (quoting *McNeil*, 407 U.S. at 249). But the confinement here is not indefinite; it is inherently temporary, and the government expedites detained cases to hasten their inevitable end. Moreover, existing procedures under Section 1226(a) are designed to address detention until the decision is made "whether the alien is to be removed," 8 U.S.C. 1226(a), and allow for subsequent bond hearings in the meantime when circumstances have materially changed. Conversely, without a material change, a subsequent hearing would be wastefully duplicative and needlessly distract IJs from their primary mission of deciding removal cases. Cf. *Goldberg* v. *Kelly*, 397 U.S. 254, 267 n.14 (1970) ("Due process does not, of course, require two hearings.").

B. The Constitution Does Not Require The Government To Bear The Burden Of Proof—Much Less By Clear-And-Convincing Evidence

1. Respondents contend (Supp. Br. 50) that, "[i]n every context where the Court has considered the constitutionality of civil detention or comparably severe deprivations of individual liberty, the Government has borne the burden of proof." Not so. In every case in which it has arisen, this Court has authorized civil detention where release was either foreclosed on a categorical basis or the burden was on the alien. *Demore*, 538 U.S. at 531; *Zadvydas*, 533 U.S. at 701; *Reno* v. *Flores*, 507 U.S. 292, 313 (1993) (the government may rely on "reasonable presumptions and generic rules"); *Carlson* v. *Landon*, 342 U.S. 524, 541-543

(1952). Indeed, when addressing potentially indefinite detention in *Zadvydas*, the Court itself placed the burden on the alien to justify release. See 533 U.S. at 701. Respondents also fail to explain why it is constitutional for longstanding regulations to place the burden on an alien in an initial bond hearing under Section 1226(a), 8 C.F.R. 236.1(c)(8), but later unconstitutional if bond is denied (or the alien fails to post bond) and detention lasts six months.

2. Relying solely on *Addington*, respondents briefly argue (Supp. Br. 51-52) that the Constitution mandates that the government bear a clear-and-convincing burden, in all cases, at the six-month mark. But respondents have no response to the many reasons why *Addington* is inapposite. *E.g.*, Gov't Br. 53; Gov't Merits Reply Br. 9-10; Gov't Supp. Br. 33-35, 50-51. More fundamentally, in the history of U.S. immigration law, the government has never borne the burden to justify interim detention by clear-and-convincing evidence—yet this Court has upheld such interim detention in every case in which it has arisen.[8]

Constitutionalizing a clear-and-convincing standard to justify interim detention of an alien seeking admission would permanently impair the government's ability to defend the Nation's borders. It would mean that aliens arriving on our doorstep—about whom the government may have limited information as to their identity, flight risk, or dangerousness—would have a presumptive entitlement to enter the United States, even on the basis of an information asymmetry. That

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[8] This Court has also upheld the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, which allows detention when flight risk is established by a preponderance, 18 U.S.C. 3142(c). *United States* v. *Salerno*, 481 U.S. 739, 741 (1987).

would leave an "unprotected spot in the Nation's armor," *Zadvydas*, 533 U.S. at 695-696 (citation omitted), that Congress could not close.

For criminal aliens detained under Section 1226(c), such a constitutional mandate would permanently increase the proportion of criminal aliens who are released and, experience has shown, will reoffend or flee "in large numbers." *Demore*, 538 U.S. at 513. The record suggests that most criminal aliens are granted bond under respondents' standard, J.A. 528, flouting Congress's judgment that bond should *never* occur. And for aliens detained under Section 1226(a) after an individualized determination of flight risk or danger, it would permanently increase the likelihood of flight or danger that prompted an IJ to deny bond (or set a high bond) the first time, when the burden was on the alien. See Gov't Supp. Br. 51-54.

C. If The Constitution Requires A Bond Hearing, It Does Not Further Require The Government To Make Duration A Bond Factor

Respondents contend (Supp. Br. 57) that the Constitution mandates that the duration of detention be counted twice, both when deciding whether to order a bond hearing and again in the bond hearing itself. But respondents identify no decision supporting that approach and no context where duration is a bond factor.

Respondents assert (Supp. Br. 57) that, "[u]nless [IJs] consider detention length when assessing the Government's justification for additional detention, the Government could justify prolonged terms of detention based only on the same initial showing it made at the first bond hearing." But that concern is misplaced. The heart of this suit is respondents' effort to force the government to provide a "first bond hearing" for aliens

seeking admission and criminal aliens detained under Sections 1225(b) and 1226(c). If a bond hearing were constitutionally required, the remedy would be to provide the process that was lacking: "an individualized determination" by an IJ "as to [the alien's] risk of flight and dangerousness." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). There is no basis for making duration a bond factor as well. The pretrial detention cases respondents rely on (Supp. Br. 57) are also inapposite, because they do not address the factors to be considered in a bond hearing. *E.g.*, *United States* v. *Hare*, 873 F.2d 796, 801 (5th Cir. 1989).

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For the foregoing reasons and those stated in our prior briefs, the judgment of the court of appeals should be reversed.

Respectfully submitted.

EDWIN S. KNEEDLER
Deputy Solicitor General[*]

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[*] The Acting Solicitor General is recused in this case.