CHANCE TO CHANGE: *JENNINGS V. RODRIGUEZ* AS A CHANCE TO BRING DUE PROCESS TO A BROKEN DETENTION SYSTEM

JOE BIANCO*

INTRODUCTION

Over the course of 1994, INS held fewer than 75,000 noncitizens in administrative immigration detention;[1] in 2013, the number of detained noncitizens peaked at 440,557 and decreased to about 300,000 in 2016.[2] Widespread detention is not only a huge economic burden, but in some cases detention of noncitizens lasts so long it becomes a human rights issue.[3] For noncitizens, detention is often determined by a government officer as a matter of routine paperwork.[4] The decision can lead to detention lasting years. The constitutionality of these detentions is challenged in *Jennings v. Rodriguez*, the outcome of which will shape the contours of immigration detention for tens of thousands of noncitizens. On appeal from the Ninth Circuit, *Rodriguez* asks the Supreme Court to decide whether noncitizens detained under certain statutory provisions are

* J.D. Candidate, Duke University School of Law, Class of 2019.

1. U.S. DEP'T OF JUSTICE, DETENTION NEEDS ASSESSMENT AND BASELINE REPORT 6 (2002).

2. U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013 6 (Sept. 2014); *see also* U.S DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 88 (Jan. 2016) (reporting reduction to 307,310 detainees).

3. *See generally* Brief of United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, Jennings v. Rodriguez, No. 15-1204 (U.S. Oct. 24, 2016) (describing how obligations of the United States mandate change in detention for asylum seekers).

4. Joint Appendix at 255–56, Jennings v. Rodriguez, No. 15-1204 (U.S. Oct. 24, 2016) ("Specifically, the files of individuals subject to the parole determination process confirm that they do not receive a bond hearing before an Immigration Judge. Instead, the files reflect a Deportation Officer—employed by DHS/ICE—decides whether or not the detainee should be released, subject to supervisory DHS/ICE officer approval.") [hereinafter Joint Appendix].

entitled to bond hearings before an Immigration Judge ("IJ"), and what needs to occur at those hearings so that they comply with the Constitution.[5]

I. FACTUAL AND PROCEDURAL HISTORY

The Plaintiff, Alejandro Rodriguez, came to the United States as an infant.[6] Based on convictions for possession of a controlled substance and "joyriding," the Department of Homeland Security (DHS) initiated removal proceedings against Rodriguez, who was working as a dental assistant.[7] While he contested his removal, he remained in custody for over three years.[8] During that time, Rodriguez never received a bond hearing.[9]

Rodriguez is the lead Plaintiff in a class action suit filed on behalf of approximately 1,000 noncitizen class members who were at some point detained in the Central District of California for more than six months without a hearing.[10] The class is divided into three subclasses—the Arriving subclass, Criminal subclass, and 1226(a) general detention subclass—each based on which immigration statute authorized the noncitizen's detention.

Initially, the district court denied class certification, which the Ninth Circuit reversed, ruling that the case raised serious constitutional concerns and the class had no bars to certification.[11] Next, the class won a preliminary injunction requiring bond hearings for the Mandatory and Arriving subclasses, which was affirmed by the Ninth Circuit in *Rodriguez v. Robbins* (*Rodriguez II*).[12] The injunction in *Rodriguez II* explained the procedural safeguards guaranteed by Ninth Circuit precedent,[13] and when these apply in the immigration context.[14] Finally, the Ninth Circuit affirmed the district court's grant

5. For discussion of constitutional procedural and substantive requirements, see *infra* notes 141–142.

6. Respondents' Brief at 5, Jennings v. Rodriguez, No. 15-1204 (U.S. Oct. 17, 2016) [hereinafter Respondents' Brief].

7. *Id.* at 5–6.

8. *Id.* at 6. DHS exercised discretionary authority under 8 C.F.R. § 241.4(l)(2) to release Rodriguez after he moved for class certification. *Id.*

9. *Id.*

10. Brief in Opposition at 6, Jennings v. Rodriguez, No. 15-1204 (U.S. May 10, 2016).

11. Rodriguez v. Hayes (Rodriguez I), 591 F.3d 1105, 1113–14 (9th Cir. 2010).

12. Rodriguez v. Robbins (Rodriguez II), 715 F.3d 1127, 1130–31 (9th Cir. 2013).

13. *See id.* at 1135–36 (discussing how Ninth Circuit has addressed previously "unanswered" questions regarding immigration detention and the application to the Rodriguez facts).

14. *See id.* at 1138–39 (discussing application to mandatory detention, given Supreme

of class-wide relief with a permanent injunction in 2015.[15] This injunction included procedural safeguards to ensure the enforcement of the statute comported with Due Process requirements.[16] The Ninth Circuit based their ruling largely on the constitutional avoidance doctrine.[17] The Government appealed the Ninth Circuit's decision, and their petition for writ of certiorari was granted by the Supreme Court on June 20, 2016.[18]

The case was first argued on November 30, 2016.[19] Several Justices expressed concern at oral argument that, because the Ninth Circuit decided the case on constitutional avoidance grounds, the constitutional questions were not properly before the Court.[20] The Court subsequently requested supplemental briefing on the issue.[21] Specifically, the Court requested briefing on whether the Constitution itself required bail hearings for class members and whether the Constitution required the procedural safeguards from the Ninth Circuit's decision.[22] Supplemental briefs were submitted by both sides, but no ruling was issued in the Court's Spring 2017 term. Instead, the Court ordered re-argument set for October 2017.

Court and other Ninth Circuit precedent).

15. Rodriguez v. Robbins (Rodriguez III), 804 F.3d 1060, 1066 (9th Cir. 2015), *cert. granted sub nom.* Jennings v. Rodriguez, 136 S. Ct. 2489 (2016).

16. *Id.*

17. *Rodriguez II*, 715 F.3d at 1134.

18. Order Granting Certiorari, Jennings v. Rodriguez, No. 15-1204 (U.S. June 20, 2016).

19. Transcript of Oral Argument, Jennings v. Rodriguez, No. 15-1204 (U.S. Nov. 30, 2016) [hereinafter Transcript of Oral Argument].

20. *See, e.g.*, *id.* at 46, lines 7–10 (Justice Kennedy); *id.* at 59 lines 9–13, 63 lines 9–16 (Chief Justice Roberts) (noting that the constitutional question may not be before the Court).

21. Opinion Requesting Supplemental Briefing, Jennings v. Rodriguez, No. 15-1204 (U.S. Dec. 15, 2016).

22. The order reads:

> The parties are directed to file supplemental briefs addressing the following questions: 1) Whether the Constitution requires that aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months. 2) Whether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months. 3) Whether the Constitution requires that, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the aliens detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

Id.

II. LEGAL BACKGROUND

Rodriguez is not the first Supreme Court case to challenge immigrant detention, but it is the first in over a decade, and it comes after several jurisdictions have adopted their own approaches.

A. Statutory Regime Governing Detention

The noncitizens who make up the certified class in this case were detained pursuant to several different statutory provisions.[23] The "Mandatory Subclass" consists of noncitizens living in the United States who are detained by the DHS after being released from criminal custody.[24] Their detention is mandatory under Section 1226(c), which was added after Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[25] Sections 1226(c)(1)(A)–(D) enumerate which crimes will trigger mandatory detention.[26] Once detained under 1226(c), aliens are not eligible for release on bond or parole under Section 1226(a),[27] and can only be released if the Attorney General determines release is necessary for witness protection purposes.[28] An alien detained under Section 1226(c) does not receive a hearing but can challenge his mandatory detention before an IJ at a "*Joseph* hearing" at which he bears the burden of proof to show he is not a flight risk or danger to the community.[29] If the noncitizen wins this appeal, then he can still be detained under 1226(a).[30] The parties contest whether 1226(c) continues to govern detention once the noncitizen moves into the regular removal process.

All noncitizens in the "Arriving Subclass" have presented themselves at a port of entry. Few individuals are detained under the

23. The certified subclasses discussed are the persons in the class relevant to the case on appeal before the Supreme Court. In *Rodriguez III*, Rodriguez claimed the class included aliens detained under Section 1231(a), but the Ninth Circuit decided aliens under 1231(a) were not part of the class and the injunction does not apply to them. *See infra* text in note 77.

24. Respondents' Brief, *supra* note 6, at 2.

25. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Title III, §§ 303(a), 371(b)(5), Sept. 30, 1996, 110 Stat. 3009-585, 3009-645 (1996).

26. 8 U.S.C. § 1226(c)(1) (2012).

27. 8 U.S.C. § 1226(a).

28. 8 U.S.C. § 1226(c)(2).

29. *See* Rodriguez v. Robbins (Rodriguez III), 804 F.3d 1060, 1078 (9th Cir. 2015), *cert. granted sub nom.* Jennings v. Rodriguez, 136 S. Ct. 2489 (2016) (explaining general *Joseph* hearing procedures); *see also In re* Joseph, 22 I. & N. Dec. 799 (BIA 1999) (establishing need for *Joseph* hearing in immigration courts).

30. *See Rodriguez III*, 804 F.3d at 1078.

challenged part of the statutory scheme because they are subject to expedited removal.[31] Therefore, only two small groups actually make up the Arriving Subclass: noncitizens who present some evidence they are entitled to entry, and asylum seekers who pass a credible fear interview.[32] The first group covers noncitizens in the catch-all bucket established by Section 1225(b)(2)(A), which states that if an immigration officer cannot determine the individual is "clearly and beyond a reasonable doubt entitled to be admitted," he or she "shall" be detained under Section 1229(a).[33] Although most people detained under this provision will quickly be subject to expedited removal, the class in this case includes, among others, legal permanent residents (LPRs) returning from travel abroad.[34] Under the statute, asylum seekers with credible fear[35] and individuals detained under Section 1225(b)(2)(A) can only be released by a parole review, which a DHS officer conducts.[36] In this particular class, over 97% of the Arriving subclass applied for asylum, and over two-thirds were granted asylum.[37] Individuals detained under Section 1225(b) are not eligible for relief,[38] unless there are medical reasons or they are testifying as a witness in another case.[39] There is no hearing, no neutral decision-maker, and no appeal.[40]

The last subclass contains individuals detained under Section 1226(a), which governs aliens "arrested and detained pending a decision on whether the alien is to be removed from the United States."[41] In these cases, an IJ can review custody determinations, and the noncitizen has the burden of proving that he or she is neither a flight risk nor a danger to the community.[42] Whereas the other subclasses challenge whether certain groups of people are entitled to

31. Respondents' Brief, *supra* note 6, at 42.
32. *Id.* at 3–4.
33. *Id.* at 3; 8 U.S.C. § 1225(b)(2)(A).
34. Respondents' Brief, *supra* note 6, at 3–4.
35. Asylum seekers who pass an initial credible fear interview are detained pursuant to Section 1225(b)(1)(B)(ii). 8 U.S.C. § 1225(b)(1)(B)(ii).
36. Respondents' Brief, *supra* note 6, at 4.
37. *See* Brief for the Petitioners at 10, Jennings v. Rodriguez, No. 15-1204 (U.S. Aug. 26, 2016) [hereinafter Brief for the Petitioners].
38. *See* 8 C.F.R. § 236.1(c)(2).
39. *See* 8 C.F.R. § 212.5(b).
40. *See* Respondents' Brief, *supra* note 6, at 4.
41. 8 U.S.C. § 1226(a) (2012).
42. *See* Matter of Guerra, 24 I. & N. Dec. 37, 40 (BIA 2006) (setting out factors and burdens in bond determinations).

hearings, the 1226(a) subclass challenges the hearings themselves.[43] Respondents argue that after the specific reasons for detention under Sections 1225(b) or 1226(c) end, all class members are detained by the authority of Section 1226(a).[44]

B. Recent Supreme Court Decisions on Detention in the Immigration Context

The Supreme Court has clarified both the scope of immigration detention and where it brushes up against Due Process in two recent cases, *Zadvydas v. Davis*[45] and *Demore v. Kim*.[46]

In *Zadvydas*, an alien was detained for several years without a hearing or a stated government justification.[47] Typically, after an alien is given a final removal order, the alien is detained during a ninety-day "removal period" as the Government determines to which country the alien should be removed.[48] However, because none of the proposed nations would accept Zadvydas, he was detained by the government for many years even after he was given his final order of removal.[49] The authorization for detention came from Section 1231(a)(6),[50] which allowed detention after the ninety-day removal expired, and the government argued that that authorization extended indefinitely.[51] Zadvydas and another detainee with similar circumstances successfully argued that limitless detention contradicted constitutional guarantees.[52] Justice Breyer began the majority opinion by emphasizing that the deprivation of liberty without due process of law clearly violates the Fifth Amendment.[53]

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43. *See* Respondents' Brief, *supra* note 6, at 5.

44. *Id.* at 33 ("Section 1226(c) authorizes detention for only a reasonable six-month period of time, after which detention authority derives from Section 1226(a) . . . Sections 1225(b)(1)(B)(ii) and 1225(b)(2)(A) authorize detention only prior to commencement of removal proceedings, after which detention is also governed by Section 1226(a).").

45. Zadvydas v. Davis, 533 U.S. 678 (2001).

46. Demore v. Kim, 538 U.S. 510 (2003).

47. *Zadvydas*, 533 U.S. at 684–85 (describing facts of Kestutis Zadvydas's detention).

48. *Id.* at 683.

49. *Id.* at 684–85.

50. 8 U.S.C. § 1231(a)(6) (2012) ("[T]he [alien] may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision . . . . ").

51. *See Zadvydas*, 533 U.S. at 689 ("The Government argues that the statute means what it literally says. It sets no 'limit on the length of time beyond the removal period that an alien who falls within one of the Section 1231(a)(6) categories may be detained.'") (citation omitted).

52. *Id.*

53. *Id.* at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to 'depriv[e]' any 'person . . . of . . . liberty . . . without due process of law.' Freedom from

The Court considered the question of whether these rights were available to noncitizens at all,[54] and determined that because the people challenging detention in this case were LPRs, not merely arriving aliens, they must have some due process protections.[55]

The Court went on to decide that because the statute did not clearly mandate detention, it was appropriate and necessary to interpret the statute to avoid serious constitutional issues.[56] The Court concluded that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."[57] Habeas petitions in federal court were considered the appropriate method for challenging detention, and district court judges were instructed to consider in each case how the continued detention related to the statutory purpose.[58]

Two years later, in *Demore v. Kim*, the Court added to this rule by deciding a case where an LPR was detained under 1226(c) while his removal proceedings were pending.[59] There, the LPR challenged his detention because he had not been given a bond hearing at which the government must prove that he posed either a danger to the community or a risk of flight.[60] Because *Zadvydas* had suggested a

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imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and 'narrow' nonpunitive 'circumstances,' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'") (citations omitted).

54. *See id.* at 692 (rejecting the Government's argument "that, from a constitutional perspective, alien status itself can justify indefinite detention").

55. *See id.* at 694 (drawing distinction between noncitizens who are physically present within the country's borders and those arriving for the first time).

56. *See id.* at 699 ("We have found nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention. Consequently, interpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.").

57. *Id.*

58. *See id.* at 699–700 ("[T]he habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely, assuring the alien's presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute. In that case, of course, the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions.").

59. Demore v. Kim, 538 U.S. 510, 513–14 (2003).

60. *See id.* at 514 ("He argued that his detention under § 1226(c) violated due process

balancing test where the length of detainment should be related to the purpose, four Circuit Courts had held that detention under Section 1226(c) without an individualized hearing was unconstitutional.[61]

In his opinion for the Court, Chief Justice Rehnquist distinguished the situation in *Zadvydas* from *Demore*.[62] First, in *Zadvydas*, the detainees were held for so long because they were unable to be deported anywhere: the lack of an attainable government goal meant that detention did not serve a legitimate purpose.[63] In *Demore*, however, the government still had a valid interest in detaining LPRs who had committed crimes that qualified them for deportation under 1226(c).[64] Justice Rehnquist's review of the Congressional record showed that mandatory detention under Section 1226(c) arose from a concern that once criminal aliens were released on bond, they could not effectively be deported because they rarely appeared at their removal hearings.[65] Congress's solution was to detain them while those hearings were pending.[66] Second, the Court found that the detention in *Zadvydas* was problematic because it was potentially "indefinite."[67] The statistics provided to the Court in *Demore* showed that in 1226(c) cases, detentions while removal proceedings were pending lasted for short amounts of time, less than ninety days in most cases, which was itself less than the six-month period that was presumed valid in *Zadvydas*.[68]

C. Application of Demore and Zadvydas

In the decade and a half since *Demore*, several Circuits have acknowledged the constitutional problem posed by long detention,

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because the INS had made no determination that he posed either a danger to society or a flight risk.").

61. *Id.* at 526–27; *see, e.g.,* Patel v. Zemski, 275 F.3d 299, 311 (3rd Cir. 2001).

62. *Demore*, 538 U.S. at 527.

63. *Id.* at 527–28.

64. *Id.* at 528.

65. *See id.* at 519–20 ("The Vera Institute study strongly supports Congress' concern that, even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight.").

66. *Id.* at 521 ("Some studies presented to Congress suggested that detention of criminal aliens during their removal proceedings might be the best way to ensure their successful removal from this country . . . . It was following those Reports that Congress enacted 8 U.S.C. § 1226, requiring the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability.").

67. Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001).

68. *Demore*, 538 U.S. at 529 ("Under § 1226(c), not only does detention have a definite termination point, in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*.").

and have developed their own rules to govern the constitutional limits on noncitizen detention.[69] The Second Circuit adopted the Ninth Circuit's rule from the preliminary injunction it issued in *Rodriguez II*, as it applies to 1226(c) detainees.[70] That "bright-line" rule requires hearings after six months where the Government bears the burden of proof by clear and convincing evidence.[71] The other approach, adopted by the Third and Sixth Circuits, is a case-by-case approach requiring every detainee to file a habeas petition in federal district court.[72] The district court then conducts a fact-specific inquiry to determine whether the detention without a hearing is still "reasonable" in each case.[73]

III. HOLDING

Rodriguez III was the final case in the Ninth Circuit's "decade-long examination of civil . . . detention in the immigration context."[74] Following the preliminary injunction it upheld in *Rodriguez II*,[75] the Ninth Circuit held that based on both Supreme Court and Ninth Circuit precedent, class members were entitled to bond hearings and those hearings had to meet specific procedural requirements.[76] This ruling only applied to members of the subclass who were detained under Sections 1226(c), 1225(b), or 1226(a).[77]

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69. *See, e.g.*, Lora v. Shanahan, 804 F.3d 601, 614–15 (2d Cir. 2015), *cert. denied,* 136 S. Ct. 2494 (2016) ("[W]hile all circuits agree that section 1226(c) includes some 'reasonable' limit on the amount of time that an individual can be detained without a bail hearing, courts remain divided on how to determine reasonableness.").

70. *See id.* ("[T]he second approach, adopted by the Ninth Circuit, is to apply a bright-line rule to cases of mandatory detention where the government's 'statutory mandatory detention authority under Section 1226(c) . . . [is] limited to a six-month period, subject to a finding of flight risk or dangerousness.'") (quoting Rodriguez v. Robbins (Rodriguez II), 715 F.3d 1127, 1133 (9th Cir. 2015)).

71. *See id.* at 616 (citing protections from *Rodriguez II*, 715 F.3d at 1331).

72. *See* Diop v. ICE/Homeland Sec., 656 F.3d 221, 231 (3d Cir. 2011) (adopting case by case approach); *see also* Chavez-Alvarez v. Warden York Cty. Prison, 783 F.3d 469, 474 n.7 (3d Cir. 2015) (declining to reconsider case-by-case approach in light of decision by Ninth and Second Circuits); Ly v. Hansen, 351 F.3d 263, 267–68 (6th Cir. 2003) (holding that *Zadvydas* guarantees only that an alien not be held for an unreasonable amount of time, and the proper avenue of relief is for an alien to file a habeas petition when their detention has become unreasonable).

73. *Diop*, 656 F.3d at 234 (holding the reasonableness test is a "fact-dependent inquiry requiring an assessment of all of the circumstances of any given case").

74. Rodriguez v. Robbins (Rodriguez III), 804 F.3d 1060, 1065 (9th Cir. 2015), *cert. granted sub nom.* Jennings v. Rodriguez, 136 S. Ct. 2489 (2016).

75. *Rodriguez II*, 715 F.3d at 1132–33.

76. *Id.* at 1074.

77. The Ninth Circuit held the constitutional avoidance doctrine did not mandate protections for individuals detained under Section 1231(a)—noncitizens who are held subject to

Based on the Supreme Court's general jurisprudence on civil detention, the Ninth Circuit held that there must also be limits and safeguards on detention in the immigration context.[78] The Ninth Circuit found that the Constitution requires that the detention have some relationship to a legitimate government goal.[79] This rationale animated the Supreme Court's decisions in *Zadvydas* and *Demore*,[80] and the Circuit's own precedent confirmed that Due Process required bond hearings when detention became "prolonged"[81] (exceeded six months).[82] Therefore, the Ninth Circuit mandated that members of the class and noncitizens detained in the future under Sections 1226(c),[83] 1225(b),[84] and 1226(a)[85] receive bond hearings after six months of detention. This rule does not put a limit on the time the government can detain a noncitizen under any of the statutory provisions at issue; it just requires that once a person has been detained for six months, the government's interest in detaining them without a stated justification has diminished to the point where there must be a hearing.[86] While the statutory language regarding the three subclasses varies, the Ninth Circuit found that IJs were statutorily authorized to conduct bond hearings for any of the subclasses.[87]

In addition to requiring an initial hearing, the Ninth Circuit mandated additional procedural safeguards to protect the liberties at

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final removal procedures. The court found that these people were necessarily excluded from the certified class in this case, because the certified class was meant to only include individuals who did *not* already receive a final order of removal. *Rodriguez III*, 804 F.3d at 1085–86, *cert. granted sub nom.* Jennings v. Rodriguez, 136 S. Ct. 2489 (2016).

78. *See Rodriguez III*, 804 F.3d at 1074–76; *see also* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363 (2014) (explaining how Supreme Court doctrine suggests the six month rule for detention in the immigration context).

79. *Rodriguez III*, 804 F.3d at 1077 ("[T]he government is required only to establish that it has a legitimate interest reasonably related to continued detention; the discretion to release a non-citizen on bond or other conditions remains soundly in the judgment of the immigration judges the Department of Justice employs.").

80. *Id.* at 1077–78.

81. *See* Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 949 (9th Cir. 2008); *see also* Singh v. Holder, 638 F.3d 1196, 1203 (9th Cir. 2011) (explaining that even where prolonged detention is statutorily authorized, there must be procedural requirements for the government to continue to detain an alien).

82. *See Rodriguez III*, 804 F.3d at 1077–78.

83. *Id*. at 1078–81.

84. *Id.* at 1081–84.

85. *Id.* at 1084–85.

86. *Id.* at 1077.

87. *See id.* at 1087–88 (calling attention to IJ responsibility to consider less burdensome means than detention in making determinations).

stake.[88] The district court had found that although previously, noncitizens bore the burden of proof at bond hearings, the Constitution required the government to prove, by clear and convincing evidence, that the alien is a danger to the community or a risk of flight.[89] The district court's requirement that IJs consider "alternatives to detention" was also accepted as it supported the holding in *Rodriguez II* that detainees should be released on "reasonable conditions" even if those conditions consisted of only electronic monitoring.[90] The Ninth Circuit found this would impose a minimal burden, because IJs likely already considered alternatives to money bond.[91] While the Circuit rejected Rodriguez's cross-appeal that IJs be required to consider the likelihood of removal because it would require too much speculation, the court did require that length of detention be considered and that detainees receive periodic hearings every six months.[92] Both of these safeguards relate to the principle that the longer an individual remains detained, the greater the government's burden should become to prove that such a lengthy detention is necessary.[93]

IV. ARGUMENTS

Although the Supreme Court requested supplemental briefing on the constitutional questions, the reasoning is similar enough to the original briefs that each sides' briefs can be considered together as one argument.

A. Petitioner's Arguments

1. Statutory Language

Petitioner's primary argument is that the statutory language sets no limits on detention precisely because Congress weighed the interests and decided that a broad rule of detention was the best way to achieve its goals.[94] Regarding individuals detained under 1225(b),

88. *See id.* at 1086–89 (addressing each procedural requirement in turn).
89. *Id.* at 1087.
90. *Id.*
91. *Id.* at 1088.
92. *Id.* at 1088–89.
93. *See id.* at 1089 ("Accordingly, a non-citizen detained for one or more years is entitled to greater solicitude than a non-citizen detained for six months. Moreover, Supreme Court precedent provides that "detention incidental to removal must bear a reasonable relation to its purpose.") (internal quotation marks omitted).
94. Brief for the Petitioners, *supra* note 37, at 14 ("Congress weighed the interests in

Petitioners argue that IJs have no authority to release noncitizens on bond, because the statute's mandatory language requires that aliens seeking admission "shall be detained for a proceeding" when they are not "clearly and beyond a reasonable doubt" entitled to be admitted.[95] Because the only exception to the statute is parole granted by the Secretary for "urgent humanitarian reasons or significant public benefit,"[96] Petitioners argue that the requirement of *Rodriguez II* that IJs give bond hearings is essentially rewriting Congress's legislation.[97] Similar mandatory language prevents IJs from granting bond to 1226(c) aliens, who can be released "only if" the Secretary decides it is an exception and that the alien does not pose a danger to the community or flight risk.[98] In listing Congress's interests—protecting American jobs,[99] preventing the frequent flight of noncitizens awaiting proceedings,[100] and preventing recidivism among criminal aliens detained under 1226(c)[101]—Petitioners argue that these policy justifications for Congress's program should not be re-weighed and overturned by a court.[102]

As a fallback position, Petitioners argue that the scheme used by the Ninth and Second Circuits is simply too broad and results in improper incentives and results. First, Petitioners believe that the six-month rule encourages delay and further litigation by aliens, who can be admitted to bond and then remain at liberty while their proceedings are pending.[103] Second, if there is to be relief from the federal courts, it should come from individual habeas petitions where judges will be able to weigh the merits of each individual case.[104] Third, the heightened burden of proof placed on the government will make it too difficult for the DHS to prove anything, and because the aliens have better access to information about their own backgrounds

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controlling the border, protecting the public from criminal aliens, affording individual aliens adequate protection and opportunities for relief and review, and minimizing the adverse foreign-relations impact of U.S. immigration law.").

95. *Id.* at 16–17; 8 U.S.C. § 1225(b)(2)(A) (2012).

96. 8 U.S.C. § 1182(d)(5)(A).

97. Brief for the Petitioners, *supra* note 37, at 20–21.

98. 8 U.S.C. § 1226(c)(2).

99. Brief for the Petitioners, *supra* note 37, at 23.

100. *Id.* at 22 (citing EOIR Report).

101. *Id.* at 32.

102. *See id.* at 14 ("The canon of constitutional avoidance is not a tool for courts to comprehensively rewrite those laws and strike a different balance.").

103. *Id.* at 42.

104. *See id.* at 46–47.

and experiences, putting the burden on the government will not lead to the best production of information for the IJ.[105]

2. Constitutional Question

Petitioners responded to the constitutional questions requested by the Court by arguing that the current structure has constitutional safeguards and that the Ninth Circuit's holding violate the Court's precedent and the principle of constitutional avoidance.[106]

First, Petitioners argue that both 1225(b) and 1226(c) provide procedure for relief. Detainees under 1225(b) have parole options,[107] detainees under 1226(c) can apply for *Joseph* hearings to challenge their detention (discussed above),[108] and anyone detained under 1226(a) receives individual consideration for release on bond.[109] Petitioners argue that these safeguards are sufficient because aliens lack rights, at least with regard to initial entry.[110] While admitting that problems could arise in some cases, Petitioners argue that broad class action reform is not the appropriate remedy.[111]

Petitioners further argue that the Court's own precedents illustrate that these procedures are well within constitutional bounds.[112] Because *Zadvydas* specifically applied to aliens whose ongoing detention was "indefinite," there is no constitutional concern raised by detention of aliens who have pending removal proceedings under 1225(b) or 1226(c).[113] *Demore* supports this position because it upheld the detention of an LPR under 1226(c), stating that "[Congress] may require that persons such as [the LPR] be detained for the brief period necessary for their removal proceedings."[114] As

105. *Id.* at 51.

106. Rodriguez v. Robbins (Rodriguez II), 715 F.3d 1127, 1134 (9th Cir. 2013) ("Our task is therefore to determine whether the government's reading of Sections 1226(c) and 1225(b) raises constitutional concerns and, if so, whether an alternative construction is plausible without overriding the legislative intent of Congress.").

107. Supplemental Brief for the Petitioners at 10–11, Jennings v. Rodriguez, No. 15-1204 (U.S. Jan. 31, 2017) (citing 8 U.S.C. § 1182(d)(5)(A)(2012)) [hereinafter Supplemental Brief for the Petitioners].

108. *Joseph* hearings are a chance for criminal detainees to challenge mandatory detention where the detainee bears the burden of proving they do not pose a flight risk or danger to the community. *See supra* note 29 and accompanying text.

109. *See* 8 C.F.R. 236.1(c)(8) (2016).

110. Supplemental Brief for the Petitioners, *supra* note 107, at 20.

111. *Id.* at 26.

112. *See id.* at 27 ("In every case in which detention incident to removal proceedings has arisen, the Court has concluded that it is constitutional.").

113. *See id.* at 29.

114. Demore v. Kim, 538 U.S. 510, 513 (2003).

Justice Kennedy noted in his concurring opinion, although detention could at some point "bec[ome] unreasonable or unjustified,"[115] such a concern was not present in *Demore* and would only occur if there were "unreasonable delay by the INS in pursuing and completing the proceedings."[116] Petitioners argue that here, the detention continues to be justified by the original reasons that Congress authorized detention of aliens on arrival.[117]

With regard to the procedures themselves, Petitioners argue that the Ninth Circuit's system—hearings every six months, burden of proof on the government by clear and convincing evidence, and length of detention being weighed as a factor—goes beyond any constitutional requirements.[118] This "rigid yardstick" is inappropriate because it fails to account for the reasons the detention may still be ongoing, namely that the alien is still appealing or otherwise litigating his case.[119] Furthermore, although protections like the clear and convincing evidence burden exist in civil contexts,[120] Petitioners argue they are not present for noncitizens detained under 1226(c) based on *Demore*, or for arriving noncitizens generally.[121]

B. Respondents' Arguments

Respondents advocate for the Ninth Circuit's rule, both by rebutting the statutory interpretation and by arguing that the Ninth Circuit's rules are required to make the statute's detention compliant with the Due Process Clause.

1. Statutory Rebuttal

Respondents challenge Petitioner's argument that 1226(c) and 1225(b) authorize limitless detention. Respondents argue that both Criminal and Arriving subclasses are governed only for a brief period

115. *Id.* at 532 (Kennedy, J., concurring).

116. *Id.*

117. *See* Supplemental Brief for the Petitioners, *supra* note 107, at 31 (arguing that the government's interests in protecting the community from crimes by 1226(c) detainees and that detainees appear at hearings do not end after six months).

118. *Id.* at 47–55.

119. Supplemental Reply Brief for the Petitioner at 1, Jennings v. Rodriguez, No. 15-1204 (U.S. Feb. 21, 2017) [hereinafter Supplemental Replay Brief for the Petitioner].

120. *See* Addington v. Texas, 441 U.S. 418, 431 (1979) (explaining "clear and convincing" burden in civil detention cases).

121. Supplemental Reply Brief for the Petitioner, *supra* note 119, at 2; *see also* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("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.").

of time by 1226(c) and 1225(b), and that after that time their detention is governed by the general detention provisions in 1226(a).[122]

For criminal aliens detained under 1226(c), Respondents point to *Zadvydas*, which noted that Congress did not specify how long someone could be detained in 1226(c) cases, and that, while six months was presumptively reasonable, Congress needed more specific language if it intended to detain someone for a longer duration.[123] For example, Congress *did* include specific language when it authorized special detention for aliens accused of terrorist acts under the Patriot Act.[124] In the Patriot Act, Congress provides that the Attorney General may certify someone as a national security threat[125] and that once someone is so certified, the Attorney General "shall maintain custody of [the individual] until the alien is removed from the United States."[126] Respondents argue when Congress wanted to authorize prolonged detention with limited review, it did so explicitly, and included safeguards even for those detainees.[127] Petitioner's broad reading of 1226(c) would render the designation and specific safeguards superfluous, because under Petitioner's reading, Congress already has powers to detain even ordinary criminal aliens for long periods of time *without* designation as a national security threat or procedural protections Congress added with the Patriot Act.[128]

For arriving aliens detained under the relevant subsections of 1225(b), Respondents note that the provisions, 1225(b)(1)(B)(ii) and 1225(b)(2)(A), provide that individuals be detained "for" the proceedings.[129] These are essentially stop-gap provisions that authorize detention until removal proceedings begin, at which point detention is authorized under 1226(a).[130] Section 1226(a) governs detention while removal proceedings are "pending," which Respondents argue better describes the state of aliens after they have been determined to have a credible fear, for example.[131] Because most

122. Respondents' Brief, *supra* note 6, at 33.
123. *See id.* at 34–35.
124. *See* 8 U.S.C. § 1226a (2012).
125. 8 U.S.C. § 1226a(a)(3).
126. 8 U.S.C. § 1226a(a)(2).
127. Respondents' Brief, *supra* note 6, at 35–36.
128. *Id.*
129. *See id.* at 43–44.
130. *See id.* at 15, 44 (explaining that 1225(b) and 1226(c) only authorize detention until regular proceedings begin, at which point 1226(a) must govern).
131. *Id*. at 44; *see also* Transcript of Oral Argument, *supra* note 19, at 49, lines 10–18 (Mr.

arriving aliens will be "summarily returned to their country of origin" the stop-gap provided by 1225(b)(2)(A) will only apply to the small group that qualify for full removal proceedings.[132] Therefore, Respondents argue, Petitioner's prediction of immigrants arriving at the border and being released into the country on bail misrepresents the scope of the potential problem.[133]

2. Constitutional Question

This statutory interpretation sets up Respondents' main argument: prolonged detention, even under 1226(a), is unconstitutional unless certain safeguards are put into place. Respondents begin with the argument that "prolonged detention must be supported by an individualized hearing before a neutral decision-maker," which is supported by precedent on civil detention in other contexts.[134] They distinguished *Demore* as an exception to this general rule, but argue that the exception was based on false information given to the Court regarding typical lengths of detention,[135] and that, unlike in *Demore*, in this case the challengers have viable defenses to removal.[136]

In contrast to the habeas relief requested by Petitioners, Respondents argue that a bright-line rule is required to remedy the constitutional concerns. First, because many detainees are *pro se*, lacking any sort of legal resources or knowledge, and often lacking English-language proficiency, a requirement that a detainee file a habeas petition in federal court "effectively robs many detainees of any opportunity for detention review."[137] Review by federal courts would not only take additional time, but the influx of thousands of habeas petitions from detained aliens could not be effectively managed by district judges.[138] Respondents note that in other detention contexts, the Supreme Court has forgone "case-by-case" analysis where that would be impracticable, and has instead imposed

Arulanantham for Respondents).

132. Respondents' Brief, *supra* note 6, at 45.

133. *See id.* at 45 ("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.").

134. *See id.* at 17–19 (collecting cases).

135. *See id.* at 19; *see also* Brief for the Petitioners, *supra* note 37, at 35 n.10 ("EOIR has informed this Office that its prior calculations were erroneous.").

136. Respondents' Brief, *supra* note 6, at 19–20.

137. *Id.* at 26.

138. Respondents' Supplemental Brief at 45, Rodriguez v. Jennings, No. 15-1204 (U.S. Jan. 31, 2017).

administrable rules to protect constitutional liberties.[139] Moreover, the bright-line rule produces quicker and more uniform outcomes that allow parties to shape expectations.[140]

V. ANALYSIS

In both criminal and civil detention contexts, the Constitution's Due Process clause imposes numerous procedural requirements before the government's interest in detention can overcome the fundamental right to be free from physical restraint.[141] The immigration detentions in this case are most analogous to civil detentions. In civil detention situations, every state and federal court requires the government to demonstrate that civil commitment is necessary by "clear and convincing" evidence before depriving someone of liberty for an extended period.[142] Even admitting that the immigration context poses unique questions,[143] a presumptive lack of citizenship[144] does not authorize detainment inconsistent with Due Process.[145]

Immigration detention imposes burdens on detainees in numerous ways. Due to especially poor conditions, it imposes physical and mental damage on detainees, and when prolonged it can lead to economic devastation for their families and inhibit their access to the legal system.[146] Forcing noncitizens into this onerous detention system

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139. *Id.* at 41 (collecting cases supporting these procedural requirements).

140. *Id.* at 47.

141. For criminal context, see for example, United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception . . . ."); for civil context, see for example, Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (discussing narrow circumstances where government detention justifies overriding the "fundamental nature of the individual's right to liberty") (internal quotations omitted).

142. *See* Addington v. Texas, 441 U.S. 418, 431 (1979) ("Having concluded that the preponderance standard falls short of meeting the demands of due process and that the reasonable-doubt standard is not required, we turn to a middle level of burden of proof that strikes a fair balance between the rights of the individual and the legitimate concerns of the state.").

143. *But see generally* Brief of *Amici Curiae* Members of Asian Americans Advancing Justice in Support of Respondents, Jennings v. Rodriguez, No. 15-1204 (U.S. Oct. 24, 2016) (arguing that Due Process rights are exactly the same, and that different detention rules for noncitizens are based in biased and antiquated ways of thinking).

144. Some individuals detained under 1226(c) or 1226(a) may be citizens who were incorrectly detained.

145. Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

146. *See* Brief of 43 Social Science Researchers and Professors as *Amici Curiae* in Support

will be justified in some cases. However, such a justification should be made before a neutral decision-maker and while considering the noncitizen's interests in liberty.

When designing that remedy, the Court should consider the bright-line approach used in the Ninth and Second Circuits, which will more consistently comply with Due Process than scattered habeas proceedings in federal court. First, because there is no right to counsel in the immigration system and most noncitizens are proceeding *pro se*,[147] an automatic hearing is the only effective way to provide the right to a hearing. Allowing release during the pre-trial period would increase access to counsel,[148] which would in turn reduce the stress on IJs to lead detainees through complicated procedure and expedite resolution of the cases while conserving judicial resources.[149] Second, because most immigration detainees are actually released well before the six month period expires,[150] the classes left in detention often have more complicated cases with difficult legal or factual questions.[151] These cases are often the most meritorious, but they lead to the longest detention.[152]

Next, because Due Process requires that detention bear "reasonable relation" to the government interest,[153] the government must offer a legitimate purpose for detention. Although the government expresses valid interests in preventing flight and avoiding

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of Respondents at 10–25, Jennings v. Rodriguez, No. 15-1204 (U.S. Oct. 24, 2016) (describing numerous harms imposed by detention).

147. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 32 (2015) (finding only 14% of immigration detainees were able to retain counsel).

148. *See Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings New York Immigrant Representation Study Report: Part 1*, 33 CARDOZO L. REV. 357, 367–68 (2011) ("[In New York,] detained individuals with cases adjudicated in New York Immigration Courts were unrepresented 67% of the time, while nondetained individuals in the same courts were unrepresented only 21% of the time.").

149. *See* Brief of Amici Curiae Nine Retired Immigration Judges and Board of Immigration Appeals Members in Support of Respondents at 12–15, Jennings v. Rodriguez, No. 15-1204 (U.S. Oct. 24, 2016) [hereinafter Brief by Immigration Judges] (explaining that diligent IJs have a harder time and expend more resources in complicated cases with noncitizens, and take extra care to make sure the immigrant gets a fair hearing).

150. See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, CERTAIN CRIMINAL CHARGE COMPLETION STATISTICS 2 (Aug. 2016), for data on aliens detained under 1226(c).

151. *See* Brief by Immigration Judges, *supra* note 149, at 16–17.

152. *See* Joint Appendix, *supra* note 4, at 122 tbl. 35 (showing a 35% success rate for class members, and a 7% success rate for general detainees of the Mira Loma facility in California).

153. *See* Jackson v. Indiana, 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.").

danger to the community, denying a hearing is not a legitimate government interest. Legitimate interests can never be served unless the government is required to make a showing of why it has chosen to detain someone.

No one is well served by the current system of detention. Whereas detention was virtually the government's only option throughout the twentieth century, technological advances have made supervised release far more effective. Noncitizens released on bond often return for their immigration hearings, and some programs boast "over 99 percent" appearance rates.[154] The cost of detention now exceeds $2.2 billion per year, while the cost of the government's Alternatives to Detention program is only $126 million.[155] Despite being nearly one-twentieth of the cost, the Alternatives to Detention Program has a daily capacity of 51,000 participants, compared to the 31,000 beds in permanent detention.[156] More recent statistics have shown that IJs are effective at evaluating whether or not to release detained aliens: in 2015, only 14% of individuals released by an IJ failed to appear at later proceedings.[157] Recidivism among 1226(c) detainees who are released is also extremely low, less than 14% in 2007.[158]

Finally, IJs are in the best position to make these decisions. They have expertise not only in immigration law generally, but also in setting bail for detainees even when there is little or no information.[159] IJs have proven more effective than Immigration and Customs Enforcement (ICE) officers at predicting which individuals will appear at hearings, achieving an 86% appearance rate as compared to 76.6% for ICE officers in 2015.[160] Furthermore, IJs also work with detainees on other aspects of their cases, and in situations where information is sparse, familiarity with the detainee herself and the

154. U.S. GOV'T ACCOUNTABILITY OFFICE, Rep. No. GAO-15-26, ALTERNATIVES TO DETENTION 30 (2014).

155. U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2017 5 (2016).

156. *Id.*

157. *See What Happens when Individuals are Released on Bond in Immigration Court Proceedings?*, app. tbl. 3, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, (Sept. 14, 2016), http://trac.syr.edu/immigration/reports/438/ [hereinafter TRAC Report].

158. U.S. DEP'T OF JUSTICE, IMMIGRATION OFFENDERS IN THE FEDERAL JUSTICE SYSTEM 6 (2010).

159. Immigration judges completed over 250,000 total bond hearings in 2012 and 2013. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2013 STATISTICS YEARBOOK app. A5 (2014).

160. *See* TRAC Report, supra note 157, app. tbl. 3.

facts of the case are crucial.[161] For these reasons, IJs can achieve better results than either ICE officers or district court judges.

CONCLUSION

The Court should affirm the Ninth Circuit's holding in *Rodriguez*, as it represents a fair approach to resolving a constitutional failure in the current immigration system. Given that the Court ordered re-argument, it seems likely that the Justices were split 4-4 when the case was first heard in Fall 2017. If Justice Kennedy sided with the conservative Justices in that split, it seems probable that with the addition of Justice Gorsuch, the deadlock will be resolved in the conservative Justices' favor. This would likely entail an end to the bright-line rule, and at best the continued use of the case-by-case approach in the Third and Sixth Circuits. Although that approach is better than no relief at all, because it is so difficult for most detainees to access, there will likely be hundreds if not thousands of noncitizens who will be detained even though they pose no danger to the community and little risk of flight.

161. *See* Brief by Immigration Judges, *supra* note 149, at 22.