LONG OVER-DUE PROCESS: PROPOSING A NEW STANDARD FOR PRETRIAL DETAINEES' LENGTH OF CONFINEMENT CLAIMS

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ABSTRACT

Prolonged pretrial detention poses one of the greatest unchecked threats to due process in the United States. The Supreme Court has never announced the proper analysis to adjudicate detainees' allegations of prolonged detention pending trial (for criminal detainees) or removal (for noncitizens in immigration detention centers). Because the Court has continually ducked this constitutional question, detainees and courts alike lack guidance regarding how to vindicate this fundamental liberty interest.

This Note identifies the inconsistencies in the Court's due process jurisprudence generally, as well as the dangers intrinsic to collapsing the standards used to evaluate pretrial detainees' claims under the Due Process Clause and prisoners' claims under the Eighth Amendment. In the wake of the Court's holding in Kingsley v. Hendrickson*, this Note argues that the Court should expand an objective due process analysis to detainees' overdetention claims in place of the subjective analysis derived from the Eighth Amendment. This Note further argues that freedom from overdetention is a fundamental right protected by substantive due process, and it proposes a framework with graduated levels of scrutiny to be applied to pretrial criminal detainees' and noncitizens' overdetention claims.*

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INTRODUCTION

"It has long been said that a society's worth can be judged by taking stock of its prisons."[1] The state of the union, then, is a bleak one indeed. Twenty percent of the global prison population is incarcerated in the United States—a nation which houses just 4 percent of the world's population.[2] The country's pretrial criminal detention population increased by 433 percent between 1970 and 2015,[3] and the total incarcerated population by a staggering 500 percent over the same period.[4] Civil immigration detention has skyrocketed in an even shorter period of time, from an average daily population of 4,411 in 1995 to 34,127 in 2010—an increase of 674 percent.[5] Of the 50,000 noncitizens that were detained by the U.S. federal government prior to removal as of April 30, 2019, 64 percent—or 32,000—had no criminal record.[6] As of February 27, 2022, 17,984 noncitizens are held in Immigration and Customs Enforcement ("ICE") detention, and 69 percent of these individuals have no prior criminal record.[7] Additional data suggest that over half of detained noncitizens languish in civil immigration detention despite not belonging to a mandatory detention category.[8]

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1. Valentine v. Collier, 140 S. Ct. 1598, 1601 (2020) (mem.) (Sotomayor, J., statement respecting the denial of application to vacate stay).

2. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/MV2W-8S3K]; Scottie Andrew, *The US Has 4% of the World's Population but 25% of Its Coronavirus Cases*, CNN, https://www.cnn.com/2020/06/30/health/us-coronavirus-toll-in-numbers-june-trnd/index.html [https://perma.cc/T6DK-3H44] (last updated June 30, 2020, 7:10 AM).

3. *Justice Denied*, VERA INST. OF JUST. (Apr. 2019), https://www.vera.org/publications/for-the-record-justice-denied-pretrial-detention [https://perma.cc/PQ8K-NRVA].

4. SENT'G PROJECT, TRENDS IN U.S. CORRECTIONS 2 (2021), https://www.sentencingproject.org/wp-content/uploads/2021/07/Trends-in-US-Corrections.pdf [https://perma.cc/7T8Q-QPCD].

5. THOMAS H. COHEN, U.S. DEP'T OF JUST., PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995–2010, at 1 (2013), https://www.bjs.gov/content/pub/pdf/pdmfdc9510.pdf [https://perma.cc/K4RE-G2AF].

6. *Growth in ICE Detention Fueled by Immigrants with No Criminal Conviction*, TRAC IMMIGR. (Nov. 26, 2019), https://trac.syr.edu/immigration/reports/583 [https://perma.cc/C3Z9-7T2Z].

7. *Immigration Detention Quick Facts*, TRAC IMMIGR. (Nov. 26, 2019), https://trac.syr.edu/immigration/quickfacts [https://perma.cc/KG98-X75X].

8. *See* Phillip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody,"* 48 MICH. J.L. REFORM 879, 882–83 (2015) ("Between 2009 and 2011, over half of all immigrant detainees had no criminal records. Of those with any criminal history, nearly 20 percent were merely for traffic offenses." (quoting *The Math of Immigration*

Mass pretrial detention imposes harms at the individual and societal levels. Discussing restrictions on detained individuals' liberties, Justice Thurgood Marshall wrote, "When the prison gates slam behind an inmate, he does not lose his human quality."[9] Prolonged pretrial detention, however, launches an assault on the detainee's humanity by depriving them of their "life, liberty, or property"[10] before they are ever convicted of a crime.[11] Where a detainee[12] is denied bail or does not have the financial means to pay the price that is set on their freedom, they risk losing their source of employment and income.[13] The defendant's family relationships and reputation in their community may be irrevocably damaged by a prolonged stay in pretrial detention.[14] Prolonged time in detention prior to a defendant's trial increases the risk that the detainee will be convicted.[15] None of these harms are compensable upon acquittal,[16] and these perverse incentives encourage more innocent defendants to

Detention, NAT'L IMMIGR. F. (Aug. 22, 2013), https://immigrationforum.org/article/math-immigration-detention [https://perma.cc/T7AF-VWRU])).

9. Procunier v. Martinez, 416 U.S. 396, 428 (1974) (Marshall, J., concurring).

10. U.S. CONST. amends. V, XIV, § 2.

11. As the Supreme Court explained,

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious.

Barker v. Wingo, 407 U.S. 514, 532–33 (1972).

12. This Note addresses the two most common forms of ostensibly temporary detention by the federal government. Where this Note refers to detainees generally, it references both detained pretrial criminal defendants and noncitizens in removal proceedings. Other categories of detention, including the civilly committed and noncitizens detained following a removal order or throughout asylum proceedings, are beyond the scope of this Note.

13. United States v. Motamedi, 767 F.2d 1403, 1414 (9th Cir. 1985) (Boochever, J., concurring in part and dissenting in part).

14. *Id.*

15. Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 203 (2018) ("[P]retrial release decreases the probability of being found guilty by 14.0 percentage points . . . suggest[ing] that initial pretrial release affects case outcomes primarily through a strengthening of defendants' bargaining positions before trial, particularly for defendants charged with less serious crimes and with no prior offenses.").

16. *Motamedi*, 767 F.2d at 1414 (Boochever, J., concurring in part and dissenting in part) ("Society has no mechanism to recompense an individual for income lost or damages to a career due to pretrial confinement. Nor do we compensate the individual and his family for their mental suffering and loss of reputation due to pretrial incarceration.").

plead guilty.[17] The dangers of pretrial detention are not isolated to a detainee's time behind bars.[18] Nor are the consequences isolated to the detained individuals. The exploding pretrial detention population costs U.S. taxpayers $38 million per day.[19] Civil immigration detention alone costs taxpayers upwards of $3 billion per year.[20]

If conditions prior to the COVID-19 pandemic were hellish, the prison system descended further into Dante's inferno as the pandemic swept through the prison system. Federal judges described the government's disregard for the health of vulnerable pretrial detainees at the outset of the pandemic as "'an outrage,' 'deliberate indifference,' 'Kafkaesque,' 'illogical,' 'alarming,' 'unfathomable,' 'offen[sive] [to the] Court,' and 'shocking.'"[21] More than 661,000 inmates had contracted COVID-19 in jails and prisons throughout the United States as of April 2021.[22] Further, the pandemic killed prisoners at higher rates than it did the general population.[23] Of the 231 inmates

17. *See* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 785–86 (2017) (presenting data that 17 percent of pretrial detainees in Harris County, Texas, "would not have been convicted but for their detention" and "suggest[ing] that [the detainees] pleaded guilty simply to go home, not because of the strength of the case against them").

18. *See* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."). *See generally* Dobbie et al., *supra* note 15 (finding that pretrial detention decreases formal sector employment).

19. *Total Cost of Pretrial Detention Estimated at up to $140 Billion Annually*, PRISON LEGAL NEWS (Jan. 31, 2018), https://www.prisonlegalnews.org/news/2018/jan/31/total-cost-pretrial-detention-estimated-140-billion-annually [https://perma.cc/28JW-WC2R].

20. *5 Reasons To End Immigration Detention*, NAT'L IMMIGR. JUST. CTR. (Sept. 14, 2020), https://immigrantjustice.org/research-items/policy-brief-5-reasons-end-immigrant-detention [https://perma.cc/J978-6MNH].

21. Letter from David Patton & Jon Sands, Fed. Pub. & Cmty. Defs. Legis. Comm., to Cong. 3 (May 11, 2020), https://www.fd.org/sites/default/files/covid19/other_resources/2020.05.11_letter_from_fd_to_congress_fixed.pdf [https://perma.cc/G3ZC-FGJQ] (quoting federal judges' condemnation of the government for failing to adequately protect incarcerated individuals during the COVID-19 pandemic).

22. *Coronavirus in the U.S.: Latest Map and Count*, N.Y. TIMES (Apr. 16, 2021, 7:51 AM), https://eji.org/wp-content/uploads/2021/04/04-16-21-Coronavirus-in-the-U.S._-Latest-Map-and-Case-Count-The-New-York-Times.pdf [https://perma.cc/7AM5-99BT].

23. Eddie Burkhalter, Izzy Colón, Brendon Derr, Lazaro Gamio, Rebecca Griesbach, Ann Hinga Klein, Danya Issawi, K.B. Mensah, Derek M. Norman, Savannah Redl, Chloe Reynolds, Emily Schwing, Libby Seline, Rachel Sherman, Maura Turcotte & Timothy Williams, *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. TIMES (Apr. 10, 2021), https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html [https://perma.cc/DKE3-6DB5]; *see also* Editorial, *America Is Letting the Coronavirus Rage Through*

who died in Texas correctional facilities from COVID-19, nearly 80 percent were pretrial detainees.[24] Conditions were just as egregious in federal immigration detention centers. Men and women who risked their lives to reach the United States begged to be deported as conditions deteriorated.[25] In sum, the COVID-19 pandemic highlighted what detained individuals have long known—conditions within jails, prisons, and immigration detention centers in the United States are abysmal at best, and life-threatening at worst.

Court closures, judicial backlogs, and prison lockdowns left detained individuals without remedy or redress as courts grappled with the public health threat posed by releasing detainees back into the community, delaying bail hearings and release.[26] Jury trials across the country were postponed due to the impossibility of jurors gathering safely, leaving individuals ineligible or unable to afford bail vulnerable

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Prisons, N.Y. TIMES (Nov. 21, 2020), https://www.nytimes.com/2020/11/21/opinion/sunday/coronavirus-prisons-jails.html [https://perma.cc/6VG6-C6JY] ("The case rates among inmates are more than four times as high as those of the general public, and the death rate is more than twice as high.").

24. Jerusalem Demsas, *80 Percent of Those Who Died of Covid-19 in Texas County Jails Were Never Convicted of a Crime*, VOX (Nov. 12, 2020, 2:50 PM), https://www.vox.com/2020/11/12/21562278/jails-prisons-texas-covid-19-coronavirus-crime-prisoners-death [https://perma.cc/ARC4-9WBC]. In an American Civil Liberties Union report grading state-by-state responses to the COVID-19 pandemic on factors such as efforts to reduce the jail population and regular testing of inmates, no state received higher than a D-. EMILY WIDRA & DYLAN HAYRE, ACLU, FAILING GRADES: STATES' RESPONSES TO COVID-19 IN JAILS & PRISONS 3 (2020), https://www.aclu.org/sites/default/files/field_document/failing_grades_states_responses_to_covid-19_in_jails_prisons_063020.pdf [https://perma.cc/HH24-YLPR].

25. Sam Levin, *'We're Gonna Die': Migrants in US Jail Beg for Deportation Due to Covid-19 Exposure*, GUARDIAN (Apr. 4, 2020, 6:00 AM), https://www.theguardian.com/world/2020/apr/04/us-jail-immigrants-coronavirus-deportation [https://perma.cc/3Z42-AW5K].

26. *See* Simone Weischelbaum, *Can't Make Bail, Sit in Jail Even Longer Thanks to Coronavirus*, MARSHALL PROJECT (May 1, 2020, 5:00 AM), https://www.themarshallproject.org/2020/05/01/can-t-make-bail-sit-in-jail-even-longer-thanks-to-coronavirus [https://perma.cc/9WXM-KG93] (detailing New York's elimination of six-day limit on jailing individuals preindictment given the inability to assemble grand juries); Alan Feuer, Nicole Hong, Benjamin Weiser & Jan Ransom, *N.Y.'s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases*, N.Y. TIMES (June 22, 2020), https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html [https://perma.cc/N37Q-UE2B] (highlighting the suspension of New York's speedy trial law and citing jurists' concern that "a prolonged delay in resuming trials could violate the Constitution"); Nicole Hong & Jan Ransom, *Only 9 Trials in 9 Months: Virus Wreaks Havoc on N.Y.C. Courts*, N.Y. TIMES, https://www.nytimes.com/2020/12/02/nyregion/courts-covid.html [https://perma.cc/4BD5-3YBR] (last updated Dec. 3, 2020) ("More than 400 defendants have been waiting inside New York City jails for over two years for their cases to be resolved, according to the mayor's office.").

to infection.[27] The threat is not over—as vaccination rates lag in prisons, each day that an individual languishes in detention increases the danger that they will contract COVID-19 under the state's care.[28] The pandemic has escalated the danger posed by pretrial detention while simultaneously stripping safeguards meant to guard against its abuse.[29] This Note cites the failures of the current criminal and immigration detention regimes to grapple with the exigencies of the pandemic not as a unique phenomenon, but to illustrate the endemic problem of overcrowded, underfunded pretrial and immigration detention facilities—which, while de jure regulatory, are de facto punitive.

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27. *Courts Suspending Jury Trials as Covid-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge [https://perma.cc/FP7Z-JQHP]. *See generally Court Orders and Updates During Covid-19 Pandemic*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic [https://perma.cc/V62C-L42V] (last updated Dec. 2, 2021) (providing updates on federal court operations); Burkhalter et al., *supra* note 23 (describing widespread cancellation of trials and hearings that left individuals who were unable to post bail "languishing in jails with a heightened risk of exposure").

28. Ann Hinga Klein & Maura Turcotte, *Vaccinations Are Lagging at Many U.S. Prisons, Where Major Virus Outbreaks Have Been Common*, N.Y. TIMES (May 22, 2021), https://www.nytimes.com/2021/05/22/us/covid-prison-vaccine.html [https://perma.cc/N4DA-Q7JD] (noting that incarcerated individuals "have been more than three times as likely as other Americans to become infected with the virus"); *see also A State-by-State Look at 15 Months of Coronavirus in Prisons*, MARSHALL PROJECT (July 1, 2021, 1:00 PM), https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons [https://perma.cc/F8QS-TSQF] (highlighting that "*at least* 398,627 people in prison tested positive for [COVID-19]," but this number likely reflects a significant undercount due to the Federal Bureau of Prisons' "policy of removing cases and deaths from its reports"); *Cases Surge in an Ohio Prison, Making It a Top U.S. Hot Spot*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/2020/04/20/us/coronavirus-live-news.html#link-4ced1d [https://perma.cc/Z9Q5-7J53] ("Despite warnings from health officials and attempts to release some inmates to avoid outbreaks, jails, prisons and detention centers have emerged as major coronavirus spreaders."); Zak Cheney-Rice, *Who 'Deserves' Jail During a Pandemic?*, N.Y. MAG. (Apr. 10, 2020), https://nymag.com/intelligencer/2020/04/cook-county-jail-coronavirus.html [https://perma.cc/59TN-HPAQ] ("[F]or many detainees, prolonged stays in jail nowadays could be a death sentence.").

29. Although public health considerations and the inability to gather juries safely are indisputably of great concern, "[e]ven if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical." Roman Cath. Diocese of Brooklyn v. Cuomo, No. 20A87, slip op. at 3 (Nov. 25, 2020) (Gorsuch, J., concurring) (granting injunctive relief against executive orders that restricted attendance at religious services on grounds that the action infringed on churchgoers' rights under the Free Exercise Clause). This reasoning is equally applicable to individuals detained pending trial, if not more so given the threat to their health.

An individual's interest in freedom from pretrial detention is "basic and significant."[30] In theory, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[31] This is no longer the case in practice. There is no statutory limit on the length of civil immigration detention prior to a removal hearing,[32] and the Speedy Trial Act—intended to limit federal pretrial detention to seventy days—is often circumvented via its "ends of justice" continuance exception.[33] The Supreme Court has declined to define the point at which such detention transforms from regulatory to punitive in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments.[34] Rather, determinations of the point at which pretrial detention has exceeded constitutional limits are discretionary and made by judges on a case-by-case basis.[35] Meanwhile, over 550,000 pretrial detainees languish in local jails and immigration detention

30. United States v. Motamedi, 767 F.2d 1403, 1414 (9th Cir. 1985) (Boochever, J., concurring in part and dissenting in part).

31. United States v. Salerno, 481 U.S. 739, 755 (1987); *see also* United States v. Berrios-Berrios, 791 F.2d 246, 250 (2d Cir. 1986) (quoting S. REP. NO. 98-225, at 6–7 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3189) (pointing to the Bail Reform Act's ("BRA") legislative history for the "traditional presumption favoring pretrial release 'for the majority of Federal defendants'").

32. *See* 8 U.S.C. § 1226 (including no temporal limit on detention prior to a removal hearing).

33. *Id.* § 3161(h)(7)(A). In reality, the seventy-day calculation does not include time that can be attributed to the defendant, including hiring attorneys to familiarize themselves with their case, trial preparation, and other time the court spends deciding pretrial motions. *See, e.g.*, United States v. Cunningham, 393 F. App'x 403, 405–06 (7th Cir. 2010) (citing the district court's invocation of the ends-of-justice exception in the Speedy Trial Act as evidence that the act was not violated where 430 days passed between indictment and trial).

34. *See, e.g.*, *Salerno*, 481 U.S. at 747 n.4 ("We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal."); Demore v. Kim, 538 U.S. 510, 527–31 (2003) (finding no temporal limit on detention pending and during removal proceedings, reasoning that such "detention ha[s] a definite termination point, [and] in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*"); United States v. Briggs, 697 F.3d 98, 101 (2d Cir. 2012) ("[D]ue process places no bright-line limit on the length of pretrial detention."). This Note principally speaks in terms of the Fifth Amendment's Due Process Clause because it applies to pretrial criminal detainees and noncitizens awaiting removal proceedings in federal custody. However, the analysis contained herein is similarly applicable to state pretrial detainees through the Due Process Clause of the Fourteenth Amendment. *See* Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.").

35. *See infra* note 294 and accompanying text.

centers under undeniably punitive conditions.[36] Detainees are frequently held within the same facilities as convicted prisoners,[37] despite the fact that postconviction detention is punitive in intent and design.

"[P]urgatory cannot be worse than hell,"[38] yet courts have historically evaluated pretrial detainees' due process claims under the same subjective deliberate indifference standard that applies to convicted prisoners and protects only against cruel and unusual punishment.[39] The subjective deliberate indifference standard requires a detainee to prove that a government official acted deliberately in violating the detainee's due process rights, showing that the defendant both acted with a "sufficiently culpable state of mind" and was aware there was a significant risk of harm to the detainee.[40] This standard is "closely linked to the language of the Eighth Amendment, which prohibits the infliction of 'cruel and unusual *punishments*.'"[41] Evaluating detainees' due process claims under a standard premised on the Eighth Amendment ignores the distinct constitutional provisions (and resulting protections) that apply to pretrial detainees and prisoners, as well as the fact that, legally, detainees "cannot be punished at all, much less 'maliciously and sadistically.'"[42]

By contrast, the objective reasonableness standard adopted by the Court in 2015 in *Kingsley v. Hendrickson*[43] when evaluating a pretrial detainee's excessive force claim against a prison official ignores the defendant's state of mind entirely. Rather, this standard simply requires the detainee to demonstrate "the force purposely or

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36. *See* Sawyer & Wagner, *supra* note 2; Levin, *supra* note 25 (describing conditions in which forty-four detainees share one shower and two toilets and sleep roughly two feet apart from each other).

37. *See* United States v. Gallo, 653 F. Supp. 320, 336 (E.D.N.Y. 1986) ("The Bail Reform Act requires that pretrial detention be imposed in a place of commitment 'separate, to the extent practicable, from persons awaiting or serving sentences . . . .' When such facilities are not available, detainees are denied the liberty consistent with the limited purpose of that detention." (quoting 18 U.S.C. § 3142(i)(2))).

38. Jones v. Blanas, 393 F.3d 918, 933 (9th Cir. 2004).

39. *See* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1025–32 (2013) (detailing varying circuits' application of the Eighth Amendment standard to pretrial detainees' due process claims).

40. Miranda v. County of Lake, 900 F.3d 335, 350 (7th Cir. 2018).

41. *Id.*

42. Kingsley v. Hendrickson, 576 U.S. 389, 400 (2015) (quoting Ingraham v. Wright, 430 U.S. 651, 671–72 (1977)).

43. Kingsley v. Hendrickson, 576 U.S. 389 (2015).

knowingly used against him was objectively unreasonable."[44] This shift marks the recognition by some circuits that because "[p]retrial detainees stand in a different position" than convicted prisoners—given that they "are still entitled to the constitutional presumption of innocence"—"the punishment model is inappropriate for them."[45] While some circuits have extended the objective deliberate indifference standard to pretrial detainees' due process claims in other contexts,[46] no circuit has extended the *Kingsley* analysis to pretrial detainees' overdetention claims.

This Note is novel in arguing for an extension of the Supreme Court's holding in *Kingsley v. Hendrickson*—and thus the application of an objective standard—to detainees' overdetention due process claims. This standard should emphasize the punitive effect, rather than the intent, of a government practice in evaluating whether detainees' due process rights have been violated. Recognizing the fundamental nature of an individual's right to liberty, this Note additionally argues for a substantive due process analysis that imposes a heightened degree of scrutiny to the government's asserted justifications for detaining individuals prior to an adjudication of guilt or removal. Additionally, this Note reconciles the circuits' competing "length of detention" jurisprudence between noncitizen detainees held in removal proceedings and individuals in pretrial criminal detention. This Note is also the first piece of scholarship to propose a model framework that can be employed by judges both in adjudicating the claims of both noncitizen detainees held in removal proceedings and pretrial criminal detainees, while retaining the case-by-case approach inherent in a due process analysis.

This Note proceeds in five parts. Part I provides an overview of Fifth Amendment due process protections for pretrial detainees and noncitizens held in removal proceedings, and it outlines the test to determine whether a government restraint is regulatory or punitive. Part II outlines the statutory framework of pretrial criminal detention, concentrating on the Bail Reform Act of 1984 ("BRA") and the Supreme Court's landmark holding in *United States v. Salerno*,[47] which rejected a facial challenge to the constitutionality of pretrial detention

44. *Id.* at 396–97.

45. *County of Lake*, 900 F.3d at 350.

46. *Infra* notes 134–37 and accompanying text.

47. United States v. Salerno, 481 U.S. 739 (1987).

justified by the possibility of the detainee's future dangerousness.[48] Part III describes the relevant detention provisions of the Immigration and Nationality Act ("INA") that have produced competing jurisprudence among the circuits and the Supreme Court as to whether due process requires a bail hearing for noncitizens facing prolonged detention. Part IV argues that the massive overuse of pretrial detention in both the criminal and immigration contexts demonstrates that the vague precedents have failed to restrain the practice to its regulatory purpose. This Part additionally argues that the Court should expand the objective deliberate indifference analysis announced in *Kingsley v. Hendrickson* to detainees' overdetention claims, and it should adjudicate these claims through a substantive due process analysis requiring a heightened degree of scrutiny. Further, Part IV analyzes the circuits' attempts to impose limits on mandatory detention without bond for noncitizens in removal proceedings, finding that such detention is similarly unconstitutional when it is not limited to "relatively brief periods of detention."[49] Part V proposes a uniform judicial framework to be applied in both the pretrial criminal and pre-removal detention contexts to adjudicate detainees' overdetention due process claims.

I. FIFTH AMENDMENT DUE PROCESS PROTECTIONS FOR DETAINEES

The Due Process Clause of the Fifth Amendment provides that no individual shall be "deprived of life, liberty, or property, without due process of law"[50] and prohibits punishment prior to "an adjudication of guilt in accordance with due process of law."[51] Pretrial detention may serve a regulatory purpose by ensuring a defendant's appearance at trial and preventing crime.[52] Conditions of pretrial detention are thus

48. *Id.* at 755.

49. Rodriguez v. Robbins, 715 F.3d 1127, 1138 (9th Cir. 2013).

50. U.S. CONST. amend. V.

51. Bell v. Wolfish, 441 U.S. 520, 535 (1979).

52. United States v. Briggs, 697 F.3d 98, 101 (2d Cir. 2012) ("Permissible regulatory purposes include 'preventing danger to the community' and 'ensur[ing] [a defendant's] presence at trial.'" (first quoting United States v. Salerno, 481 U.S. 739, 747 (1987), then quoting *Bell*, 441 U.S. at 536)); *see also* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("The [INA] . . . has two regulatory goals: 'ensuring the appearance of aliens at future immigration proceedings' and '[p]reventing danger to the community.'"); *Bell*, 441 U.S. at 537 (noting that "regulatory restraints," but not "punitive measures," may be imposed prior to a guilty verdict).

constitutional so long as they are legitimately related to this purpose. Conditions that are intended to be punitive—or are so severe that they are punitive in effect—are prohibited by the Fifth Amendment.[53] However, an individual's due process protections weaken upon criminal conviction, at which point the less protective Eighth Amendment standard kicks in; as a result, punishment remains constitutional so long as it is not "cruel and unusual."[54] Noncitizens jailed in immigration detention centers possess the same Fifth Amendment due process protections as pretrial detainees.[55]

The distinction between regulatory and punitive government action determines what restraints the government may impose on an individual—pretrial detainees can only be subject to regulatory restraints, but prisoners can be punished within constitutional bounds so long as that punishment is not "cruel or unusual."[56] No bright-line rule defines when government action transforms from "regulatory" to "punitive," but the Supreme Court considered seven factors to guide

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53. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) (concluding that the statutes in question were punitive in nature and unconstitutional "lacking as they do the procedural safeguards which the Constitution commands").

54. U.S. CONST. amend. VIII. As the Fifth Circuit explained in *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996),

> The constitutional rights of a convicted state prisoner spring from the Eighth Amendment's prohibition on cruel and unusual punishment, and, with a relatively limited reach, from substantive due process. The constitutional rights of a pretrial detainee . . . flow from both the procedural and substantive due process guarantees of the Fourteenth Amendment.

Id. at 639 (citation omitted). *Compare* Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."), *with* Turner v. Safley, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid [under the Eighth Amendment] if it is reasonably related to legitimate penological interests."). Postconviction detention, by contrast, is punitive. Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (explaining that, in the postconviction context, conditions that are not cruel and unusual, but that are nonetheless "restrictive and even harsh . . . are part of the penalty that criminal offenders pay for their offenses against society").

55. *See, e.g.*, E.D. v. Sharkey, 928 F.3d 299, 306–07 (3d Cir. 2019) (explaining that the court was "join[ing] a number of our sister Circuits in expressly holding that immigration detainees are entitled to the same due process protections [as pretrial detainees]" (first citing Charles v. Orange Cnty., 925 F.3d 73, 85–86 (2d Cir. 2019); then Chavero-Linares v. Smith, 782 F.3d 1038, 1041 (8th Cir. 2015); then Belbachir v. County of McHenry, 726 F.3d 975, 979 (7th Cir. 2013); then Porro v. Barnes, 624 F.3d 1322, 1326 (10th Cir. 2010); and then Edwards v. Johnson, 209 F.3d 772, 778 (5th Cir. 2000))).

56. *Bell*, 441 U.S. at 537; *Rhodes*, 452 U.S. at 347.

this inquiry in *Kennedy v. Mendoza-Martinez*.[57] Two of these factors involve asking whether the sanction is excessive relative to its purpose and was motivated by a punitive intent.[58]

The Court later applied the *Kennedy* factors to a pretrial detainee's conditions of confinement due process claim in *Bell v. Wolfish*.[59] In *Bell*, the Court laid out a test that asked whether "particular restrictions and conditions accompanying pretrial detention" were regulatory or punitive and, by extension, violative of the pretrial detainee's constitutional due process rights.[60] Initially, the Court asked whether the practice was "imposed for the purpose of punishment."[61] In the absence of "expressed [punitive] intent," the Court asked whether the restriction could "rationally be connected" to an alternative, nonpunitive purpose.[62] It determined that "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'"[63] However, if the restriction is not rationally connected to a legitimate government purpose and appears arbitrary, a court may infer that it is punitive and unconstitutional.[64] This is an exacting standard, and Justice John Paul Stevens noted in dissent that "[a]ny restriction [that serves a government function] . . . could not be characterized as 'arbitrary or purposeless' and could not be 'conclusively shown' to have no reasonable relation to the Government's mission."[65]

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57. As Justice Arthur Goldberg explained in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963),

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry . . . .

Id. at 168–69 (citations omitted).

58. *Id.*

59. Bell v. Wolfish, 441 U.S. 520, 538 (1979).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 539.

64. *Id.*

65. *Id.* at 585 (Stevens, J., dissenting).

Eight years later, the Court considered these factors to determine whether pretrial detention without bail based on a finding of future dangerousness amounted to a punitive condition in violation of the detainee's due process rights.[66] In *United States v. Salerno*, the Court held that "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment,"[67] and that the pretrial detention of a La Cosa Nostra mob boss served the government's legitimate interest in protecting the community from future crime.[68] The Court placed great emphasis on its understanding of the BRA's mandatory detention provision as "operat[ing] only on individuals who have been arrested for a specific category of *extremely serious* offenses."[69] The Court declined to recognize any temporal limit on pretrial detention imposed by the Due Process Clause,[70] despite Marshall's protest that the potential for indefinite detention created by the statute was "consistent with the usages of tyranny and . . . incompatible with the fundamental human rights protected by our Constitution."[71] Applying rational basis review to the facial challenge to the BRA, the Court reasoned that pretrial detention was not "excessive in relation to the regulatory goal [of community safety] Congress sought to achieve."[72] Importantly, the Court did not confront a *prolonged* pretrial detention claim; as a result, it did not specify the level of scrutiny that it would apply in that context.

Detention of pretrial criminal defendants has multiplied in the decades since the *Salerno* decision.[73] Lacking clear guidance from the Supreme Court, the circuits have split over both the appropriate analysis for detainees' overdetention due process claims and the line at

66. United States v. Salerno, 481 U.S. 739, 746–51 (1987). As a note, courts adjudicating due process claims today do not apply the *Kennedy* analysis to determine case-by-case whether pretrial detention in the specific case is punitive versus regulatory—*Salerno* established that, de facto, pretrial detention is constitutionally valid when accompanied by the procedural safeguards enumerated in the BRA. *Id.* at 747–48. Rather, courts look to the presence of other factors including the length of detention and nonspeculative length of future detention—among others—in assessing whether a detainee's due process rights have been violated as a result of their overdetention. See *infra* notes 292–96, for a greater discussion of the courts' consideration of these factors.

67. *Salerno*, 481 U.S. at 746.

68. *Id.* at 749.

69. *Id.* at 750 (emphasis added).

70. *Id.* at 747 n.4.

71. *Id.* at 755 (Marshall, J., dissenting).

72. *Id.* at 747 (majority opinion).

73. *See supra* notes 4–6.

which detention becomes punitive in violation of the detainees' Fifth Amendment due process rights.[74]

II. PRETRIAL CRIMINAL DETAINEES

This Part is divided into two sections. Section A details the relevant statutes surrounding pretrial detention and their intersection with federal pretrial criminal detainees' Fifth Amendment due process and Sixth Amendment speedy trial rights. Section B discusses two circuit splits that have emerged in adjudicating pretrial detainees' length-of-detention claims. The first is whether a substantive or procedural due process analysis should be employed in evaluating detainees' due process claims based on prolonged pretrial detention. The second split involves whether an objective unreasonableness or subjective deliberate indifference standard should be applied to detainees' due process claims.[75]

A. The Statutory Framework

1. *The Bail Reform Act of 1984.* The BRA enumerates the procedures for federal pretrial criminal detention.[76] Congress was spurred to amend the original, 1966 version of the BRA due to rising crime in the United States throughout the 1970s and 1980s.[77] The 1984 amendments to the BRA marked a shift from the statute's original mandate that judges release individuals under the "least restrictive conditions" possible prior to trial by enabling judges to deny bail due to perceived threats of flight risk or public safety.[78] Additionally, Congress expanded the list of crimes that subject alleged criminals to pretrial criminal detention.[79] The amended statute ultimately gave judges more discretion to grant or deny bail based on their own findings of dangerousness, resulting in "both a rise in the number of

74. *See infra* Part II.B.

75. Kingsley v. Hendrickson, 576 U.S. 389, 391–92, 395 (2015).

76. Bail Reform Act of 1984, 18 U.S.C. § 3142.

77. Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2018, 7:30 AM), https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality [https://perma.cc/NPY6-GZVD].

78. *Id.*; Bail Reform Act of 1984, Pub. L. No. 98-473, title II, § 203(a), 98 Stat. 1837, 1976–81 (codified as amended at 18 U.S.C. §§ 3141–3150).

79. Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 732 (2018).

pretrial detainees and an increase in racial disparities among those who were locked up."[80]

In theory, the statute now requires imposition of the least restrictive conditions that will ensure the detainee's appearance at trial and the safety of the community,[81] and it permits pretrial detention only where "no condition or combination of [alternate] conditions" will suffice.[82] In making a bail determination, the statute instructs the court to consider the nature of the charged crime, the weight of evidence against the defendant, the individual's "history and characteristics," potential danger to the community, and risk of flight.[83] For certain violent crimes, there is a rebuttable presumption that the defendant should be detained pretrial, and the burden shifts to the detainee to produce evidence of their nondangerousness and that they are not a flight risk.[84] If the judge denies bail, they must include "written findings of fact and a written statement of the reasons for the detention"[85] and order that the individual be confined before trial "in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences."[86] While the Act seems to provide for an array of procedural safeguards, it is watered down in practice—many judges abide by fixed bail schedules that assign bond based on the charged offense and render bond decisions in assembly line hearings lasting only a few minutes per defendant, where most defendants are not represented by counsel.[87]

In addition to these standards, courts turned to a rarely used provision of the BRA during the COVID-19 pandemic.[88] Under

80. *Id.* at 738; Bail Reform Act § 203(a).

81. *See* 18 U.S.C. § 3142(e)(1) ("[If] the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.").

82. *Id.*

83. *Id.* § 3142(g).

84. *Id.* § 3142(e)(3).

85. *Id.* § 3142(i)(1).

86. *Id.* § 3142(i)(2).

87. Heaton et al., *supra* note 17, at 729, 773, 779; Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 933 (2013).

88. *See, e.g.*, United States v. Kennedy, 449 F. Supp. 3d 713, 718 (E.D. Mich. 2020) (holding release under § 3142(i) was "necessary for the compelling reason that it will protect Defendant, the prison population, and the wider community during the COVID-19 pandemic"), *denying reconsideration* No. 18-20315, 2020 WL 1547878 (E.D. Mich. Apr. 1, 2020).

§ 3142(i), temporary release following the denial of bail may be permitted only where "necessary for preparation of the person's defense or for another compelling reason."[89] Section 3142(i) "has been used sparingly"[90] and is not broadly protective of pretrial detainees' liberty rights. A court in the Southern District of New York cited § 3142(i) in reasoning that "the continued confinement of individuals being held to ensure that they appear at their immigration proceedings . . . does not serve the public's interest," given the pandemic.[91] A court in the Eastern District of Michigan similarly remarked that "the *only* reasonable response by [the government] is the release of [p]etitioner" because "any other response demonstrates a disregard of the specific, severe, and life-threatening risk to [p]etitioner from COVID-19."[92] In a postpandemic world, § 3142(i) of the BRA could be used as a vehicle to revisit a judge's decision to detain an individual on a periodic basis, as it allows a judge to analyze whether conditions have changed such that a detainee would not pose a flight risk or threat to the community. However, it is unclear whether judges would be receptive to the increased use of this previously obscure and underutilized provision of the BRA.

2. *The Speedy Trial Act of 1974.* A separate constitutional protection—the Sixth Amendment speedy trial right[93]—is relevant to any discussion of pretrial detainees' overdetention claims. A pretrial detainee's Sixth Amendment speedy trial right is distinct from a claim that their due process rights under the Fifth or Fourteenth Amendments have been violated due to prolonged pretrial detention.

89. 18 U.S.C. § 3142(i).

90. United States v. Hamilton, No. 19-CR-54-01 (NGG), 2020 WL 1323036, at *2 (E.D.N.Y. Mar. 20, 2020); *see also* United States v. Lee, 451 F. Supp. 3d 1, 5–6 (D.D.C. 2020) (describing the "limited prior authority regarding . . . temporary release under section 3142(i)" and how "few courts" have used it "sparingly"); United States v. Acevedo-Baldera, No. 3:18-CR-00155 (AWT), 2020 WL 9156933, at *8 (D. Conn. Nov. 23, 2020) (noting that "a medical condition may be considered a 'compelling reason' for temporary release" but citing *Hamilton* for the proposition that § 3142(i) has been "sparingly used").

91. Valenzuela Arias v. Decker, No. 20 CIV. 2802 (AT), 2020 WL 1847986, at *9 (S.D.N.Y. Apr. 10, 2020).

92. Malam v. Adducci, 452 F. Supp. 3d 643, 660 (E.D. Mich. 2020) (emphasis added).

93. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."); *see also* Smith v. Hooey, 393 U.S. 374, 374–75 (1969) (concluding that the Sixth Amendment speedy trial right "is enforceable against the States as 'one of the most basic rights preserved by our Constitution'" (quoting Klopfer v. North Carolina, 386 U.S. 213, 226 (1967))).

The Speedy Trial Act,[94] which codifies the federal speedy trial right, applies regardless of whether an individual is detained pretrial,[95] while an overdetetention claim levied under the Fifth or Fourteenth Amendment due process rights requires the continued detention of a defendant.

Congress enacted the Speedy Trial Act shortly following the Supreme Court's holding in *Barker v. Wingo*.[96] In *Barker*, the Court declined to impose a bright-line rule to determine whether an individual's speedy trial rights under the Sixth Amendment were violated; instead, the Court proposed four factors that should be considered.[97] The Act requires that a defendant's trial commence within seventy days from the later date of either the public filing of the information or indictment or the defendant's most recent appearance before the court.[98] An indictment must be filed within thirty days of arrest[99]—limiting pretrial detention, in theory, to one hundred days. However, this requirement "has turned out to be illusory,"[100] and the

94. Speedy Trial Act, 18 U.S.C. § 3161.

95. The Speedy Trial Act clock tolls upon the date of a defendant's arrest or indictment (whichever comes first) and runs until their trial—it does not stop if a defendant is released on bail pending on trial. *See id.* § 3161(c)(1) (providing that an individual should be brought to trial within seventy days of the latest date of either their indictment or their appearance before the court in which that charge is pending); *id.* § 3161(h) (listing excludable types of delay when computing time under the Act). The *Barker* Court recognized that prejudice (one of the four factors the court will consider in weighing whether a defendant's Sixth Amendment speedy trial rights have been violated) may result from trial delay even where a defendant is released on bail, reasoning that "a defendant confined to jail prior to trial is obviously disadvantaged by delay as is a defendant released on bail but unable to lead a normal life because of community suspicion and his own anxiety." Barker v. Wingo, 407 U.S. 514, 527 (1972); *see also* Moore v. Arizona, 414 U.S. 25, 27 (1973) (per curiam) (recognizing that pretrial prejudice includes the potential to "disrupt [the defendant's] employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends," and "may seriously interfere with the defendant's liberty, whether he is free on bail or not" (quoting United States v. Marion, 404 U.S. 307, 320 (1971))).

96. *Barker*, 407 U.S. at 514; Speedy Trial Act of 1974, Pub. L. No. 93-619, title I, § 101, 88 Stat. 2079. In addition, forty states and the District of Columbia have enacted their own speedy trial guarantees that provide additional recourse for state detainees. *Speedy Trial Rights*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 24, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/speedy-trial-rights.aspx [https://perma.cc/5QBJ-M3Y8].

97. *Barker*, 407 U.S. at 530–32 (proposing a balancing test that considers the "[l]ength of delay, the reason for the delay," whether the defendant has invoked their speedy trial right, and resulting prejudice to the defendant as a result of the delay in bringing them to trial).

98. 18 U.S.C. § 3161(c)(1).

99. *Id.* § 3161(b).

100. United States v. Accetturo, 783 F.2d 382, 394 (3d Cir. 1986) (Sloviter, J., dissenting).

statute has not lived up to its purpose of "effectuat[ing] the Speedy Trial provision of the Sixth Amendment."[101] This is largely due to the nine exclusions built into the Act[102]—especially the catch-all exclusion that permits judges to grant continuances to the "ends of justice."[103] There is no statutory limit on how many such continuances may be granted, and the circuits have split on the question.[104] District court judges throughout the country regularly cited this provision when tolling the Speedy Trial Act during the COVID-19 pandemic due to the impossibility of holding jury trials and bail arraignments, despite the potential for abuse of this provision by district attorneys.[105] This practice illuminated the significant due process problem that can arise when a district court judge has unlimited discretion to detain an individual to further the "ends of justice."[106] This is exacerbated by the unlikely probability of rebuke by an appellate court that may only reverse a district court's decision for clear error and given the Supreme Court's failure to impose an explicit temporal limit on pretrial detention.[107]

B. Judicial Interpretation of Pretrial Detention Claims

As discussed in Part I, the Supreme Court held in *Salerno* that pretrial detention does not violate substantive due process where it is

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101. *Id.*

102. *See* 18 U.S.C. § 3161(h) (listing the nine exceptions).

103. *Id.* § 3161(h)(7)(A). *See generally* Greg Ostfeld, Note, *Speedy Justice and Timeless Delays: The Validity of Open-Ended "Ends of Justice" Continuances Under the Speedy Trial Act*, 64 U. CHI. L. REV. 1037 (1997) (addressing the lack of an explicit time limit requirement for ends-of-justice continuances and ambiguity surrounding when such continuances should be granted).

104. *See* Ostfeld, *supra* note 103, at 1042–52 (outlining circuit split).

105. *See, e.g.*, Administrative Order Regarding Computation of Time Under the Speedy Trial Act, 18 U.S.C. § 3161, No. 2:20mc7, 2020 WL 1430429, at *2 (E.D. Va. Mar. 23, 2020) ("[T]he ever-expanding risk of exposure to COVID-19 . . . causes it to be practically impossible to seat a jury and/or obtain a quorum of grand jurors while maintaining compliance with the current public health and safety recommendations from the [Centers for Disease Control and Prevention] and the President."); N.Y. COMP. CODES R. & REGS. tit. 9, § 8.202 (2020) (New York governor's executive order suspending limits on pretrial detention until petit juries can be safely assembled).

106. United States v. Sheikh, 493 F. Supp. 3d 883, 888, 890 (E.D. Cal. 2020) (denying ends of justice continuance on grounds that it would "amount to kicking the can down the road" and dismissing case without prejudice where defendant had waited two years for trial and the government requested an additional six-month continuance).

107. United States v. Olsen, No. 20-50329, 2022 WL 60361, at *3 (9th Cir. Jan. 6, 2022) ("We review de novo a district court's decision to dismiss on Speedy Trial Act grounds and its findings of fact for clear error. A district court's ends of justice determination will be reversed only if it is clearly erroneous." (citations omitted)).

rationally related to a legitimate government purpose and has followed fair procedures.[108] Lacking any additional guidance from the Court on how to distinguish regulatory and punitive pretrial detention, circuits have split on the proper test for adjudicating detainees' overdetention due process claims in two ways. The first split involves whether prolonged pretrial detention violates substantive or procedural due process.[109] The second, more prominent split concerns whether pretrial detainees are entitled to greater constitutional protections than convicted prisoners and, by extension, merit a different analysis for their overdetention due process claims.[110]

1. *Substantive or Procedural Due Process*. Due process rights may be both substantive[111] and procedural.[112] Substantive due process rights are "fundamental"[113] and "'deeply rooted in this Nation's history and

108. United States v. Salerno, 481 U.S. 739, 747 (1987).

109. *Compare, e.g.*, Luckes v. County of Hennepin, 415 F.3d 936, 939–40 (8th Cir. 2005) (considering totality of the circumstances in determining whether length of pretrial detention shocks the conscience and violates substantive due process), *with* Jauch v. Choctaw County, 874 F.3d 425, 430 (5th Cir. 2017) (noting where "'the fault lies in a denial of fundamental procedural fairness,' the question is one of procedural due process").

110. *Compare* Villegas v. Metro. Gov't of Nashville, 709 F.3d 563, 568 (6th Cir. 2013) (explaining pretrial detainees' due process claim should be evaluated "under the same rubric as Eighth Amendment claims brought by prisoners"), *and* Butler v. Fletcher, 465 F.3d 340, 345 (8th Cir. 2006) ("Pretrial detainees and convicted inmates, like all persons in custody, have the same right to . . . basic human needs."), *and* Hamm v. DeKalb County, 774 F.2d 1567, 1574 (11th Cir. 1985) ("Life and health are just as precious to convicted persons as to pretrial detainees."), *with* Alberti v. Klevenhagen, 790 F.2d 1220, 1224 (5th Cir. 1986) (explaining that despite pretrial detainees and convicted prisoners being housed within the same facility, the Due Process Clause accords greater rights to pretrial detainees), *and* Youngberg v. Romeo, 457 U.S. 307, 322 (1982) (explaining civilly committed detainees "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish"). *See generally* City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (noting that pretrial detainees' rights are "at least as great" as Eighth Amendment protections available to prisoners).

111. *See* County of Sacramento v. Lewis, 523 U.S. 833, 856 (1998) (Kennedy, J., concurring) ("It can no longer be controverted that due process has a substantive component as well.").

112. Carey v. Piphus, 435 U.S. 247, 266 (1978) ("[T]he right to procedural process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and . . . [it is important] to organized society that procedural due process be observed . . . ."); *see* Zinermon v. Burch, 494 U.S. 113, 125 (1990) ("[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986))).

113. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

tradition' . . . 'and conscience of our people,'"[114] without which "neither liberty nor justice would exist."[115] A substantive due process analysis asks whether an "adequate *reason*"[116] exists for depriving an individual of their life, liberty, or property and recognizes that "certain [government] actions are prohibited no matter what procedures attend them."[117] By contrast, procedural due process rights protect an individual against arbitrary government action, asking whether "adequate *procedures*" were taken before depriving an individual of their life, liberty, or property.[118]

Not all circuits have recognized that a detainee's right to be free from prolonged pretrial detention is a substantive due process guarantee.[119] The Seventh and Eighth Circuits have applied a substantive due process analysis to overdetention claims, reasoning that the analysis requires an appraisal of the totality of the circumstances to determine whether conduct shocks the conscience.[120] The Fifth Circuit has also suggested that a substantive due process analysis may apply in the absence of clear procedural deficiencies.[121] Yet, "[w]ithout deciding [that question]," the Fifth Circuit held "prolonged-detention cases do raise the immediate question of

114. *Id.* at 721 (first quoting Moore v. City of East Cleveland, 431 U.S. 494, 501 (1977); and then quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

115. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

116. Erwin Chemerinsky, *Procedural Due Process Claims*, 16 TOURO L. REV. 871, 871 (2016) (emphasis added).

117. County of Sacramento v. Lewis, 523 U.S. 833, 856 (1998) (Kennedy, J., concurring).

118. Chemerinsky, *supra* note 116 (emphasis added); *see also* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (considering "the risk of an erroneous deprivation of [a liberty interest] . . . and the probable value, if any, of additional or substitute procedural safeguards" to determine whether a procedural due process violation has occurred).

119. *See infra* note 120 (noting the circuits that have recognized freedom from excessive pretrial detention as a right protected by substantive due process).

120. *See, e.g.*, Holloway v. Del. Cnty. Sheriff, 700 F.3d 1063, 1069–71 (7th Cir. 2012) (looking to the totality of the circumstances to determine whether individual's due process rights were violated where they alleged the jail medical staff exhibited deliberate indifference to their medical condition); Armstrong v. Squadrito, 152 F.3d 564, 581 (7th Cir. 1998) (remarking that the inquiry into whether an official's action in depriving a detainee of his constitutional right shocks the conscience given the totality of the circumstances "ultimately defines the parameters of the Fourteenth Amendment"); Luckes v. County of Hennepin, 415 F.3d 936, 939 (8th Cir. 2005) (adopting the Seventh Circuit's framework in *Armstrong* and asking "(1) whether the Due Process Clause prohibits the alleged deprivation of rights; (2) whether the defendants' conduct offended the standards of substantive due process; and (3) whether the totality of the circumstances shocks the conscience").

121. Jauch v. Choctaw County, 874 F.3d 425, 430–31 (5th Cir. 2017).

whether the pre-trial detainee's procedural due process rights have been violated" and opted to resolve the case on those grounds.[122]

This distinction is significant. The Court's recognition that prolonged pretrial detention implicates a fundamental right rooted in the nation's history would determine the level of scrutiny these claims receive—rational basis review (if not fundamental) or strict scrutiny (if fundamental).[123] "[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them'"[124]—in other words, the procedural guarantees outlined in the BRA that the Court upheld as facially valid in *Salerno*. As a result, the Court could hold that *prolonged* pretrial detention violates substantive due process and implicates a fundamental right, even where the *initial* pretrial detention may not cross this threshold.[125] Such a holding would have enormous consequences for individuals in prolonged detention whose due process rights have eroded over the length of their confinement.

2. *Reconciling the Subjective Eighth Amendment Standard with* Kingsley*'s Objective Test* The scope of constitutional protections afforded to an individual—and the resulting analysis a court may

122. *Id.* (citing the test announced by the Supreme Court in *Medina v. California*, 505 U.S. 437, 443 (1992), to determine when to apply procedural due process by asking whether the state rule of criminal procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or (ii) transgresses any recognized principle of 'fundamental fairness' in operation").

123. *See infra* Part IV.C (discussing how the fundamental nature of a right may affect the level of scrutiny it receives and using Second Amendment jurisprudence as an example of such); *see also* Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (explaining that not all substantive due process rights receive strict scrutiny, and rather, "*only* fundamental rights qualify for this so-called 'heightened scrutiny' protection. . . . All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest").

124. Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990)); *see also id.* ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

125. United States v. Salerno, 481 U.S. 739, 750–51 (1987) (reasoning "we cannot categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" *after* the Government has "prove[d] by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community . . . ." (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))). The Supreme Court has not clarified whether *prolonged* pretrial detention implicates a fundamental right—and, by extension, would be subject to heightened scrutiny.

undertake—hinges on the individual's detention status.[126] Pretrial detainees—"those who exist in the in-between" of arrestees (covered by the Fourth Amendment) and prisoners (covered by the Eighth Amendment's prohibition against cruel and unusual punishment)—are in theory covered by the due process protections of either the Fifth Amendment (federal detainees) or Fourteenth Amendment (state detainees).[127] Coverage by different amendments, however, does not necessarily mandate different constitutional analyses. The Supreme Court has remarked that pretrial detainees' rights are "at least as great" as Eighth Amendment protections available to prisoners,[128] but cautioned that the "presumption of innocence . . . has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[129] The Court historically evaluated detainees' deliberate indifference due process claims under the same Eighth Amendment standard that applied to convicted prisoners' claims, requiring the detainee to show that a state actor had a punitive intent in violating the detainee's due process rights.[130] But the collapsing of the two standards into a single analysis ignores the Supreme Court's own pronouncements that "Eighth Amendment scrutiny is appropriate only after the State has complied with the

126. *See* Crocker v. Beatty, 995 F.3d 1232, 1246 (11th Cir. 2021) (describing which amendments cover which individuals depending on their detention status). Relatedly, while overdetained individuals may rely on different statutes to bring their due process claims depending on whether they are held in federal or state custody, the resulting analysis is the same: a detainee must show that the prison official both knew of serious harm resulting from continued detention and disregarded that risk in denying bail to the detainee. *See, e.g.*, West v. Tillman, 496 F.3d 1321, 1327 (11th Cir. 2007) (finding no due process violation where the detainee "pointed to no evidence showing that [the official] subjectively knew that her acts would lead to [the detainee's] over-detention or that [the official] disregarded any such risk").

127. *Crocker*, 995 F.3d at 1246 (quoting Piazza v. Jefferson County, 923 F.3d 947, 952 (11th Cir. 2019)).

128. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

129. Bell v. Wolfish, 441 U.S. 520, 533 (1979). *Compare* Hubbard v. Taylor, 399 F.3d 150, 165–66 (3d Cir. 2005) ("[T]he Eighth Amendment [is] relevant to conditions of pre-trial detainees only because it establishe[s] a floor."), *with* Hart v. Sheahan, 396 F.3d 887, 893 (7th Cir. 2005) ("[W]hen the issue is whether brutal treatment should be assimilated to punishment, the interests of the prisoner [are] the same whether he is a convict or a pretrial detainee."), *and* Hamm v. DeKalb County, 774 F.2d 1567, 1574 (11th Cir. 1985) ("Life and health are just as precious to convicted persons as to pretrial detainees.").

130. *See supra* note 40 and accompanying text; Kingsley v. Hendrickson, 576 U.S. 389, 391–92 (2015) (replacing the subjective deliberate indifference standard modeled on the Eighth Amendment that was previously used for detainees' excessive force claims with an objective unreasonableness standard).

constitutional guarantees traditionally associated with criminal prosecutions," and "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law."[131]

In *Kingsley v. Hendrickson*, the Court reasoned that a detainee challenging the excessive use of force by a prison official needed only show "objective evidence that the challenged governmental action is *not* rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose."[132] This framing of the rational basis standard was notably different than that announced in *Bell*, in which the Court held that where "a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'"[133]

Following *Kingsley*, the circuits grappled with how to extend this new objective inquiry to other types of pretrial due process claims. The Second, Sixth, Seventh, and Ninth Circuits have rejected the subjective Eighth Amendment standard in favor of the objective *Kingsley* standard in cases involving detainees' inadequate medical care claims.[134] By contrast, the Third, Fifth, Eighth, Tenth, and Eleventh Circuits have declined to extend *Kingsley* beyond detainees' excessive

131. *City of Revere*, 463 U.S. at 244 (quoting Ingraham v. Wright, 430 U.S. 651, 671–72 n.40 (1977)). For additional discussion of the overlap between the analyses for detainees under the Fifth and Eighth Amendments, see generally Rosalie Berger Levinson, Kingsley *Breathes New Life Into Substantive Due Process as a Check on Abuse of Government Power*, 93 NOTRE DAME L. REV. 357 (2017) and David C. Gorlin, Note, *Evaluating Punishment in Purgatory: The Need To Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417 (2009).

132. *Kingsley*, 576 U.S. at 398 (emphasis added).

133. *Bell*, 441 U.S. at 539.

134. Bruno v. City of Schenectady, 727 F. App'x 717, 720 (2d Cir. 2018) (reasoning that the Second Circuit's adoption of *Kingsley*'s objective indifference standard in a conditions of confinement decision (*Darnell*) mandates the same objective standard for detainees' inadequate medical care claims); Brawner v. Scott County, 14 F.4th 585, 596 (6th Cir. 2021) ("Given *Kingsley*'s clear delineation between claims brought by convicted prisoners under the Eighth Amendment and claims brought by pretrial detainees under the Fourteenth Amendment, applying the same analysis to these constitutionally distinct groups is no longer tenable."); Miranda v. County of Lake, 900 F.3d 335, 352 (7th Cir. 2018) (extending the *Kingsley* objective unreasonableness standard to pretrial detainees' inadequate medical care claims); Gordon v. County of Orange, 888 F.3d 1118, 1124 (9th Cir. 2018) ("[L]ogic dictates extending the objective deliberative indifference standard . . . to medical care claims.").

use of force claims.[135] The Second Circuit stands alone in extending *Kingsley* to pretrial detainees' conditions of confinement claims.[136] Similarly, the Ninth Circuit is the only circuit that has applied the objective unreasonableness standard to detainees' failure-to-protect claims.[137] No circuit has considered extending the *Kingsley* objective unreasonableness analysis to a detainee's overdetention due process claim.

An example of the subjective deliberate indifference analysis as applied to a pretrial detainee's prolonged detention claim arose in the Eleventh Circuit. In *West v. Tillman*,[138] the Eleventh Circuit reasoned that a detainee alleging overdetention in violation of his Fourteenth Amendment due process rights needed to show that officials were

135. *See, e.g.*, Moore v. Luffey, 767 F. App'x 335, 340 n.2 (3d Cir. 2019) (declining to extend *Kingsley*'s objective unreasonableness standard to inadequate medical care claims and remarking that application of either the objective unreasonableness or deliberate indifference standard would not affect the outcome given failure to show more than negligence); Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415, 419 n.4 (5th Cir. 2017) (declining to extend *Kingsley*'s objective deliberate indifference standard to failure-to-protect claims and pointing to petitioner's failure to even properly raise this claim); Whitney v. City of St. Louis, 887 F.3d 857, 860 n.4 (8th Cir. 2018) (reasoning that *Kingsley* does not control outside of excessive force cases); Strain v. Regalado, 977 F.3d 984, 991 (10th Cir. 2020) (declining "to extend *Kingsley* to Fourteenth Amendment deliberate indifference claims" and reasoning that "the nature of [such] claim[s] infers a subjective component"), *cert. denied*, No. 20-1562, 2021 WL 4509029 (U.S. Oct. 4, 2021); Dang v. Seminole County, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (reasoning that the petitioner's inadequate medical care claim was not squarely covered by *Kingsley* and, even if it was, the petitioner's claim "is, at most, negligence" which falls "categorically beneath the threshold of constitutional due process" (quoting *Kingsley*, 576 U.S. at 396)); De Veloz v. Miami-Dade County, 756 F. App'x 869, 876 (11th Cir. 2018) (applying Eighth Amendment subjective deliberate indifference standard to a pretrial detainee's conditions of confinement claim and remarking that "the standards under the Fourteenth Amendment are identical to those under the Eighth"). *But see* Bowles v. Bourbon County, No. 21-5012, 2021 WL 3028128, at *8 (6th Cir. July 19, 2021) (declining to "contribute to the circuit split on the relevant test" where detainee's inadequate medical care claim would fail under both the objective unreasonableness and subjective deliberate indifference standards).

136. *See* Darnell v. Pineiro, 849 F.3d 17, 30 (2d Cir. 2017) (concluding "that the Supreme Court's decision in *Kingsley* altered the standard for deliberate indifference claims under the Due Process Clause" and applying *Kingsley*'s objective standard to detainee's conditions of confinement claim).

137. Castro v. County of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016) (requiring a detainee to show that an official intentionally placed the detainee in conditions that put him at risk—in this case, placing the detainee in the same cell as a dangerous inmate—and "did not take *reasonable* available measures to abate that risk, even though a *reasonable* officer in the circumstances would have appreciated the high degree of risk involved" (emphasis added)). *Contra* Leal v. Wiles, 734 F. App'x 905, 911–12 (5th Cir. 2018) (dismissing a detainee's failure-to-protect claim because he did not show the official had actual knowledge that he was the target of a planned gang attack and purposely put him in a cell with an inmate affiliated with that gang).

138. West v. Tillman, 496 F.3d 1321 (11th Cir. 2003).

deliberately indifferent to his due process rights despite being aware of a risk of serious harm and acting in disregard of that risk.[139] This framing of the issue is relevant where detainees point to a specific harm resulting from prolonged detention—for example, prolonged exposure to COVID-19.[140] By contrast, under the objective unreasonableness standard announced by *Kingsley*, the detainee would not face the same requirement to demonstrate officials' knowledge of the seriousness of a risk. Instead, the detainee would just need to show a risk of prolonged detention and that prolonged detention was excessive or not rationally related to the government's interest in preventing the detainee's flight and/or protecting the community—for example, where there were less severe means of serving these government interests, such as through house arrest.[141]

None of the current avenues available to pretrial detainees are satisfactory to protect their fundamental right to liberty under the U.S. Constitution. As a result, the proposed standard is designed to be more protective of their rights than those of convicted prisoners, as intended by the separate constitutional protections for the two categories of individuals.

III. NONCITIZEN DETENTION IN REMOVAL PROCEEDINGS

Like criminal defendants, noncitizens in removal proceedings enjoy Fifth Amendment due process protections.[142] Yet, noncitizens lack the same scope of procedural rights enshrined outside the Fifth and Fourteenth Amendments. For example, criminal pretrial detainees have the right to government-provided counsel,[143] a "speedy and public

139. *Id.* at 1327.

140. *See, e.g.*, Malam v. Adducci, 452 F. Supp. 3d 643, 660 (E.D. Mich. 2020) (accepting a pretrial detainee's argument that officials were subjectively aware of the danger posed by COVID-19 to the detainee, who suffered from a severe underlying health condition).

141. *See* Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015) ("[A] pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.").

142. Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (explaining that noncitizens detained within the United States are entitled to the full scope of protection offered by the Fifth Amendment, and "shall not be . . . deprived of life, liberty or property without due process of law").

143. U.S. CONST. amend. VI.

trial,"[144] and freedom from excessive bail and fines.[145] By contrast, noncitizens' constitutional procedural rights do not extend beyond those guaranteed by the Fifth Amendment in removal proceedings, and these detainees have no constitutional guarantee to counsel, a jury, or a bail hearing.[146] The lack of procedural safeguards available to detained noncitizens illustrates that "immigration detention is criminal detention but without the constitutional protections."[147]

In this Part, Section A outlines the statutory framework surrounding noncitizen detention prior to a removal hearing and following a removal order in the INA. Section B analyzes the Supreme Court's interpretation of these provisions in light of the Fifth Amendment in *Zadvydas v. Davis*,[148] *Demore v. Kim*,[149] and *Jennings v. Rodriguez*.[150] This Part argues that the Supreme Court's reasoning in these respective cases is inconsistent, and it recommends a framework to unify the Court's treatment of noncitizens' due process rights regardless of the INA provision under which they are detained. This framework is immediately relevant, as the Court is poised to decide two cases during the 2021 term centering on the question of whether noncitizens detained pending removal are entitled by statute to a bond hearing.[151]

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144. *Id.*

145. U.S. CONST. amend. VIII.

146. *See* Note, *The Right To Be Heard from Immigration Prisons: Locating a Right of Access to Counsel for Immigration Detainees in the Right of Access to Courts*, 132 HARV. L. REV. 726, 726, 729, 740–41 (2018) ("Unlike criminal defendants, noncitizens have no Sixth Amendment right to government counsel in immigration proceedings — only a statutory right to retained counsel."); AM. IMMIGR. COUNCIL, TWO SYSTEMS OF JUSTICE: HOW THE IMMIGRATION SYSTEM FALLS SHORT OF AMERICAN IDEALS OF JUSTICE 5–10 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf [https://perma.cc/Z967-TYJF] (highlighting the lack of due process protections for noncitizens in federal detention as compared to pretrial detainees). It is unsettled whether pretrial criminal detainees have a right to counsel at a bail hearing. *See* Heaton et al., *supra* note 17, at 774 (describing the "open [constitutional] question" as "whether the bail hearing is itself a 'critical stage'" at which time a defendant has a right to "adequate representation" (quoting Rothgery v. Gillespie County, 554 U.S. 191, 212 (2008))).

147. Torrey, *supra* note 8, at 880.

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

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

150. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

151. Aleman Gonzalez v. Barr, 955 F.3d 762 (9th Cir. 2020), *cert. granted sub nom.* Garland v. Gonzalez, 210 L. Ed. 2d 1009 (Aug. 23, 2021) (considering whether individuals subject to final removal orders and detained under 8 U.S.C. § 1231(a)(6) have a right to an individualized bond hearing after six months); Arteaga-Martinez v. Warden York Cnty. Prison, No. 19-1054, 2019 WL

A. The Statutory Framework

The INA outlines the procedures surrounding noncitizen detention prior to removal.[152] The provisions relevant to this discussion are 8 U.S.C. § 1231—the provision governing detention following a final removal order that was challenged in *Zadvydas v. Davis*,[153] and again in the Court's 2021 term[154]—and 8 U.S.C. §§ 1225–26, which involve detention prior to a removal hearing and were challenged in *Demore v. Kim* and *Jennings v. Rodriguez*.[155] Originally passed in 1952, the INA has been frequently amended in the seventy years since its codification, and recent priorities have shifted to limiting unauthorized immigration, largely at the U.S.–Mexico border.[156]

To be eligible for bail, a noncitizen must demonstrate by clear and convincing evidence that they are neither dangerous nor a flight risk.[157] The immigration judge does not have to consider a noncitizen's ability to pay in setting bail, which must be at least $1,500.[158] The average bail amount for noncitizens in 2016 was $8,000, and 6.5 percent of

13031922 (3d Cir. Aug. 20, 2019), *cert. granted sub nom.* Johnson v. Arteaga-Martinez, 210 L. Ed. 2d 1009 (Aug. 23, 2021) (same). In *Gonzalez*, the Court will also consider whether courts may issue a classwide injunction prohibiting the government from detaining noncitizens without bond hearings beyond six months, as opposed to making individualized determinations as to each detainee. *Gonzalez*, 210 L. Ed. 2d at 1009.

152. Immigration and Nationality Act (INA), 8 U.S.C. §§ 1225–1226, 1231.

153. *Id.* § 1231; *Zadvydas*, 533 U.S. at 682.

154. *See supra* note 151 and accompanying text.

155. 8 U.S.C. §§ 1225–1226; Demore v. Kim, 538 U.S. 510, 513–14 (2003); *Jennings*, 138 S. Ct. at 839.

156. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1225–1226).

157. *Compare* 8 C.F.R. § 236.1(c)(3) (2021) (stating that a lawfully admitted noncitizen eligible for release on bond "*must* first demonstrate, by clear and convincing evidence, that release would not pose a danger to the safety of other persons or of property . . . [and] that the [noncitizen] is likely to appear for any scheduled proceeding . . . ." (emphasis added)), *with* 18 U.S.C. § 3142(b) ("The judicial officer *shall* order the pretrial release of the person on personal recognizance [or bond] . . . *unless* the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." (emphasis added)). While the language of the BRA favors a presumption of bail—requiring clear and convincing evidence to continue detaining an individual—the INA flips this presumption on its head and shifts the burden onto the detained noncitizen, requiring clear and convincing evidence to show that they *should* be released.

158. 8 U.S.C. § 1226(a)(2)(A). This is one example of a marked disparity in the procedural protections afforded to noncitizens and pretrial criminal detainees, given the latter's protection under the Eighth Amendment of freedom from excessive bail or fines. U.S. CONST. amend. VIII; *see also* 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.").

noncitizens' bails were set at over $25,000.[159] Noncitizens otherwise eligible for relief may spend days, months, or weeks in detention due to their inability to make bail.[160] The INA contains no provision requiring that an immigration judge periodically revisit their findings to detain an individual without bail. Additionally, immigration officers have discretion at any time in a noncitizen's removal proceedings to obtain or revoke a detainee's release on bond.[161]

Moreover, the INA contains a mandatory detention provision for certain classes of noncitizens detained prior to removal; this can only be overridden by the attorney general in narrowly proscribed circumstances.[162] The class of crimes that mandate detention in the civil detention context are broader than that in the criminal context. For example, the BRA provides that defendants charged with certain offenses are subject to a rebuttable presumption of mandatory pretrial detention.[163] Most of the predicate convictions carry a minimum prison term of ten years and include offenses involving firearms, drugs, minors, and other violent crimes.[164] By contrast, a noncitizen may be mandatorily detained prior to a removal hearing for a crime as minor as a repeat drug misdemeanor—for example, possession of one Xanax pill—if they are charged with recidivist possession of a controlled substance, an "aggravated felony" under the mandatory detention

159. *What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?*, TRAC IMMIGR. (Sept. 14, 2016), https://trac.syr.edu/immigration/reports/438 [https://perma.cc/FS8C-MPQF].

160. For an overview of bond procedures in civil immigration detention, see generally Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157 (2016).

161. 8 U.S.C. § 1226(b).

162. *Id.* § 1226(c) (identifying the classes of noncitizens that must be detained and permitting release of such noncitizens on bond "*only if* the Attorney General decides . . . that release is . . . necessary to provide protection to a witness, a potential witness, a person cooperating with [a major criminal] investigation . . . , or an immediate family member or close associate" of one of those persons and that the noncitizen does not pose a danger to the community or a flight risk (emphasis added)).

163. *See* 18 U.S.C. § 3142(e)(3) ("Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed [one of the enumerated crimes of violence listed in the statute].").

164. *See id.* § 3142(f)(1) (listing crimes of violence with maximum prison terms of more than ten years, any offense carrying a maximum sentence of life imprisonment or death, any drug offense carrying a term of greater than ten years, any felony involving a dangerous weapon or firearm, and where the defendant has committed two predicate felonies).

statute.[165] Even simple possession of marijuana or petty theft can trigger mandatory detention in certain states, even where such possession may be legal in others.[166] Immigration judges have no discretion to grant bail to removable noncitizen detainees convicted of certain crimes, including recidivist possession of a controlled substance or "crimes involving moral turpitude."[167] Meanwhile, Congress has eliminated judicial review of an immigration judge's final removal orders for noncitizens detained under INA's mandatory detention provision.[168] In practice, this means that once a noncitizen has been assigned to a mandatory detention category under the INA, they do not have the ability to appeal a final order of removal.

Overall, the INA's mandatory detention provision offers a significantly less protective standard than the "rebuttable presumption" in the BRA. While the BRA accomplishes a similar goal—the imposition of harsher standards to obtain release from detention for individuals charged with more severe crimes or repeat offenses—it nonetheless permits judges to exercise discretion in reaching a bail determination where there is clear and convincing evidence that doing so would not override the public interest.[169] Similarly, the lack of any time limit for when a noncitizen may obtain a bail hearing after appealing a custody determination by ICE sharply contrasts with the BRA's requirement that the court hold a hearing "immediately" to determine whether the defendant is eligible for

165. *See* Carachuri-Rosendo v. Holder, 560 U.S. 563, 581–82 (2010).

166. Farrin R. Anello, *Due Process and Temporal Limits on Immigration Detention*, 65 HASTINGS L.J. 363, 366 n.12 (2014).

167. 8 U.S.C. § 1226(c)(1)(B), (C) ("The Attorney General *shall* take into custody any alien who . . . (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title . . . [or] (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year"); *see id.* § 1227(a) (listing classes of deportable aliens, including those who have been convicted of a "[c]rime[] of moral turpitude" [§ 1227(a)(2)(A)(i)], recidivist possession of a controlled substance [§ 1227(a)(2)(B)(i)]).

168. *Id.* § 1252(a)(2)(C) (stripping jurisdiction of any court to review final orders of removal for certain categories of criminal noncitizens, including those detained under the INA's mandatory detention provision); *see also* MARGARET MIKYUNG LEE, CONG. RSCH. SERV., R43226, AN OVERVIEW OF JUDICIAL REVIEW OF IMMIGRATION MATTERS 3 (2013) ("[T]here is no judicial review of removal determinations based on particular grounds of inadmissibility or deportability . . . ." (citing 8 U.S.C. § 1252(a)(2)(C))).

169. *See* 18 U.S.C. § 3142(e)(1)–(3) (shifting the burden to the detainee to rebut the presumption that "no condition or combination of conditions will reasonably assure . . . the safety of any other person and the community" if the individual is released on bail where charged with a certain category of crimes).

bail.[170] Although pretrial criminal detainees and noncitizens share the same due process rights under the Fifth Amendment, noncitizens lack the same degree of statutory oversight to ensure that such rights are being vindicated.

A potential argument that noncitizens should not be entitled to equal bail protections is that they have a greater incentive to skip bail upon release. This argument, of course, extends beyond noncitizens to detainees generally and is reflected in the belief that "an unaffordable bail amount is the only amount sufficient to create an adequate disincentive to flee."[171] However, data suggests that 86 percent of noncitizens released on bail appear for court.[172] Although statistics are less readily available given the more fractured pretrial criminal system, one study suggested that 94 percent of state criminal defendants released pretrial return to court; another, more recent study suggests that pretrial release may increase the likelihood of a defendant's failure to appear at his scheduled hearing by 15 percentage points.[173] Nor do these statistics address the difference between flight risk and failure to appear. Rather than a flight from justice, defendants (especially those without means) may miss hearings due to an inability to take off work, obtain transportation or child care, or simply by confusing their court date.[174] Further, less costly supervisory mechanisms exist that could

170. *Compare* 8 C.F.R. § 1003.19(a) (2021) ("Custody and bond determinations . . . *may* be reviewed by an Immigration Judge . . . ." (emphasis added)), *with* 18 U.S.C. § 3142(f) ("The hearing shall be held immediately upon the person's first appearance . . . .").

171. Heaton et al., *supra* note 17, at 779 (acknowledging this argument and rebutting because "[i]f the bail is unaffordable and therefore results in detention, it is not functioning as a deterrent at all . . . [but] as an indirect means of detention"). While outside the scope of this Note, for a more extensive discussion of cash bail reform and the implications for pretrial detainees, see generally Van Brunt & Bowman, *supra* note 79.

172. TRAC IMMIGR., *supra* note 159.

173. *See* Dobbie et al., *supra* note 15, at 203 (explaining study characteristics and finding that "pretrial release increases the probability of failing to appear in court by 15.6 percentage points").

174. *See* Ethan Corey & Puck Lo, *The 'Failure to Appear' Fallacy*, APPEAL (Jan. 9, 2019), https://theappeal.org/the-failure-to-appear-fallacy [https://perma.cc/5LTZ-45CZ] (highlighting that "'failure to appear' rates obscure the fact that many who miss court aren't on the run[,]" and rather, "people who miss court dates for reasons beyond their control are counted the same as defendants who intentionally avoid court. . . . They might need child care, or they are just confused by the court system. A court appearance might take place months after a ticket—long forgotten—was issued"). *See generally* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018) (arguing for a distinction in the definitions and risk calculations of nonappearance and flight).

serve the government's interest in protecting the public and ensuring future appearance in a less burdensome manner.[175]

Weaker procedural safeguards afforded to noncitizens as a result of their exclusion from constitutional guarantees enshrined outside the Due Process Clause, including protection against excessive bail in the Eighth Amendment and guarantee to counsel and a speedy trial in the Sixth Amendment—coupled with Congress's stripping back of the remedies available to noncitizens to challenge their detention during removal proceedings—increasingly render the promise of procedural fairness to noncitizens illusory.

B. Judicial Interpretation

The INA lacks any ceiling on the maximum amount of time a noncitizen may be detained prior to a removal hearing or final order of removal.[176] Noncitizens thus lack any statutory analog to the Speedy Trial Act to limit detention prior to a removal hearing or following an order of removal in the immigration context. As a result, they have challenged the lack of temporal limits on detention in the INA as violative of the Fifth Amendment's Due Process Clause in three landmark Supreme Court cases, with two more currently before the Supreme Court.[177]

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175. *See* Emily Kassie, *Detained: How the US Built the World's Largest Immigrant Detention System*, GUARDIAN (Sept. 24, 2019, 1:39 PM), https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump [https://perma.cc/8DKC-C4AZ] (highlighting the existence of less costly alternatives to detention, such as electronic monitoring and regular supervision via phone check-ins and home visits that run $4.42 per day on average); *see also* Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2161–70 (2017) (outlining ICE's Intensive Supervision Appearance and Electronic Monitoring Device program as one viable alternative to detention for "high-risk individuals" and community-supervision programs for lower-risk individuals); *Supervision Costs Significantly Less than Incarceration in Federal System*, U.S. CTS. (July 18, 2013), https://www.uscourts.gov/news/2013/07/18/supervision-costs-significantly-less-incarceration-federal-system [https://perma.cc/2ZN2-EJQE] (In 2012, "[p]retrial detention for a defendant was nearly *10 times more expensive* than the cost of supervision of a defendant by a pretrial services officer in the federal system." (emphasis added)); *Incarceration Costs Significantly More Than Supervision*, U.S. CTS. (Aug. 17, 2017), https://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision [https://perma.cc/H8Z6-ZLLX] (comparing the average annual cost of detaining one individual before trial [$31,842] to community supervision of the individual prior to trial [$4,026]).

176. Jennings v. Rodriguez, 138 S. Ct. 830, 834 (2018) ("Nothing in the text of § 1225(b)(1) or § 1225(b)(2) hints that those [detention] provisions have an implicit 6–month time limit on the length of detention.").

177. *See generally* Zadvydas v. Davis, 533 U.S. 678 (2001) (considering a challenge to INA detention time limits); Demore v. Kim, 538 U.S. 510 (2003) (same); Jennings v. Rodriguez, 138 S.

In *Zadvydas v. Davis*, the Court recognized an implicit six-month temporal limit on detention following a noncitizen's final removal order.[178] The Court relied on its interpretation of the Fifth Amendment in the pretrial criminal detention context, reiterating that prolonged detention is warranted only where "limited to specially dangerous individuals and subject to strong procedural protections."[179] The Court remarked that "once the flight risk justification evaporates, the only special circumstance present [to justify ongoing detention] is the alien's removable status itself, *which bears no relation to a detainee's dangerousness*."[180] However, in *Demore v. Kim* two years later, the Court declined to extend this presumptive limit to noncitizens facing mandatory detention *prior to* a removal hearing on the grounds that "post-removal-period detention, *unlike detention pending a determination of removability* . . . , has no obvious termination point."[181]

In *Demore*, the Court relied on evidence submitted by the United States that mandatory detention pending removal proceedings typically lasted "less than the 90 days [the Court] considered presumptively valid in *Zadvydas*"—information that the government wrote to the Court to correct thirteen years after that holding.[182] Subsequently, the circuits have struggled to reconcile this decision with increasingly prolonged periods of detention. In *Rodriguez v. Robbins*,[183] for example, the Ninth Circuit confronted the constitutional problems with the INA's mandatory detention provision. The court rejected the government's contention that "under *Zadvydas* and *Demore*, mandatory detention under § 1226(c)

Ct. 830 (2018) (same). The Court is currently considering two challenges to the INA. *See supra* note 151.

178. *Zadvydas*, 533 U.S. at 701.

179. *Id.* at 690–91.

180. *Id.* at 691–92 (emphasis added).

181. *Demore*, 538 U.S. at 529 (alteration in original) (quoting *Zadvydas*, 533 U.S. at 697).

182. *Id.* After the Court granted certiorari in *Jennings*, the acting solicitor general notified the Court to correct a misrepresentation of fact that had been made by the government in its submissions to the Court in *Demore*, and upon which the Court had relied in its decision. *See* Letter from Ian Heath Gershengorn, Acting Solic. Gen., to Scott S. Harris, Sup. Ct. Clerk (Aug. 26, 2016), https://trac.syr.edu/immigration/reports/580/include/01-1491%20-%20Demore%20Letter%20-%20Signed%20Complete.pdf [https://perma.cc/VW4F-ND3N] (describing how "EOIR made *several significant errors* in calculating those figures" which erroneously suggested that "'in the majority of cases,' detention under Section 1226(c) 'lasts for less than * * * 90 days'" (emphasis added)).

183. Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013).

without a bond hearing is permissible because such detention has a definite termination point,"[184] reasoning that "*Demore*'s reach is limited to relatively brief periods of detention."[185] Instead, the court held that the mandatory detention provision "must be construed 'to contain an implicit "reasonable time" limitation'" in order to avoid a clash with the Constitution.[186] The court set this limitation at six months, "at which point the government's authority to detain the alien would shift to § 1226(a), which is discretionary" and would trigger an individualized bond hearing.[187] The Second Circuit agreed, holding a bond hearing should be required to justify mandatory detention under § 1226(c) after six months.[188] By contrast, the Third Circuit declined to impose a "presumptive [six-month] threshold[]" due to "the highly fact-specific nature" of a due process inquiry,[189] but it held due process required a bond hearing where the length of detention "strain[s] any common-sense definition of a limited or brief civil detention."[190]

Five years after the Ninth Circuit's decision, the Supreme Court rebuked the lower court's attempt to "to rewrite [the mandatory detention] statute as it pleases" in *Jennings v. Rodriguez*, abrogating the circuits' post-*Demore* jurisprudence.[191] The Ninth Circuit had held noncitizens detained under INA §§ 1225(b), 1226(a), 1226(c), and 1231(a) were entitled to automatic, individualized bond hearings after six months of detention.[192] Citing the lack of textual support in the INA for a firm time limit on detention of noncitizens,[193] the Court criticized the Ninth Circuit's use of the canon of constitutional avoidance to reconcile the statute with the Ninth Circuit's understanding of what protections were owed to noncitizens by the Fifth Amendment's Due

184. *Id.* at 1138.

185. *Id.*

186. *Id.* (quoting *Zadvydas*, 533 U.S. at 682).

187. *Id.* at 1144.

188. Lora v. Shanahan, 804 F.3d 601, 606 (2d Cir. 2015), *cert. granted*, *judgment vacated*, 138 S. Ct. 1260 (2018) ("[M]andatory detention for longer than six months without a bond hearing affronts due process.").

189. Chavez-Alvarez v. Warden York Cnty. Prison, 783 F.3d 469, 474 n.7 (3d Cir. 2015), *abrogated on other grounds by* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

190. *Id.* at 477.

191. *Jennings*, 138 S. Ct. at 843.

192. *Id.* at 842–43 (discussing the Ninth Circuit's holding in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015)).

193. *Id.*

Process Clause.[194] Ironically, the Supreme Court had done precisely this in *Zadvydas* by reading an implicit six-month limitation on postremoval detention where this language did not exist in the statute.[195] However, in *Jennings*, the Court explicitly limited its holding to rejecting the statutory argument that the INA required periodic bond hearings, so it did not foreclose the ability of noncitizens to raise a due process challenge to alleged overdetention under the statute.[196]

The Third and Ninth Circuits have since held that, notwithstanding the Court's rejection of a periodic bond hearing requirement for noncitizens detained pending removal proceedings under § 1226 in *Jennings*, such a requirement can be read into the postremoval statute where noncitizens have been ordered removed but are arguing for withholding of removal and face prolonged detention under § 1231(a)(6).[197] The Third and Ninth Circuits each held that an individualized bond hearing requirement after six months of detention is consistent with the Court's *Zadvydas* precedent and mandated by due process.[198] This framework is immediately relevant, as the Court is

194. *Id.* at 843.

195. *Id.*; *see* Zadvydas v. Davis, 533 U.S. 678, 701 (2001) ("We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months.").

196. *Jennings*, 138 S. Ct. at 851.

197. *See* Arteaga-Martinez v. Warden York Cnty. Prison, No. 19-1054, 2019 WL 13031922 (3d Cir. 2019), *cert. granted sub nom.* Johnson v. Arteaga-Martinez, 210 L. Ed. 2d 1009 (Aug. 23, 2021); Guerrero-Sanchez v. Warden York Cnty. Prison, 905 F.3d 208 (3d Cir. 2018); Aleman Gonzalez v. Barr, 955 F.3d 762 (9th Cir. 2020), *cert. granted sub nom.* Garland v. Gonzalez, 210 L. Ed. 2d 1009 (Aug. 23, 2021).

198. *See* Guerrero-Sanchez v. Warden York Cnty. Prison, 905 F.3d 208, 222 (3d Cir. 2018) ("At a certain point, continued detention becomes . . . unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community." (quoting Diop v. ICE/ Homeland Sec., 656 F.3d 221, 232 (3d Cir. 2011))); *see also id.* at 221 (reasoning that *Zadvydas* "did not explicitly preclude courts from construing § 1231(a)(6) to include additional *procedural* protections . . . should those protections be necessary to avoid detention that could raise different constitutional concerns"); *Aleman Gonzalez*, 955 F.3d at 773–88 (declining to hold that *Jennings* overruled its circuit precedent requiring individualized bond hearings after six months under § 1231(a)(6) and citing Diouf v. Napolitano, 634 F.3d 1081 (9th Cir. 2011), which held that a noncitizen detained under § 1231(a)(6) must receive a bond hearing before an immigration judge). The Ninth Circuit also cited its decision requiring the government to demonstrate clear and convincing evidence that a noncitizen should continue to be detained at a bond hearing, reasoning that "even where prolonged detention is permissible, 'due process requires "adequate procedural protections" to ensure that the government's asserted justification for physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint."'" Singh v. Holder, 638 F.3d 1196, 1203 (9th Cir. 2011) (quoting Casas-Castrillon v. DHS, 535 F.3d 942, 950 (9th Cir. 2008) (quoting Zadvydas v. Davis, 533 U.S. 678, 690 (2001))).

poised to decide two cases this term centering on whether noncitizens may be detained for over six months without a bond hearing pending removal.[199]

Given the tension between the circuits' and the Supreme Court's interpretations of various INA provisions, there is a need for clarification as to the temporal limitations imposed by due process on prolonged detention of noncitizens in removal proceedings. The courts' reliance on the canon of constitutional avoidance to construe INA provisions is not a substitute for clarity from the Supreme Court as to what substantive and procedural due process require to justify the prolonged detention of noncitizens in immigration detention centers.[200] Given the lack of a parallel to the Speedy Trial Act in the removal context, judicial intervention via the form of a revised analysis to detainees' due process claims is even more important to safeguard noncitizens' due process rights.

IV. A NEW SUBSTANTIVE DUE PROCESS ANALYSIS: APPLYING *KINGSLEY*'S OBJECTIVE UNREASONABLENESS STANDARD AND HEIGHTENED SCRUTINY TO OVERDETENTION CLAIMS

Where an individual's fundamental right to liberty is at stake due to prolonged pretrial detention, due process demands a more exacting degree of scrutiny than the current rational basis standard. The widespread use of detention prior to trial ignores both the language of the BRA[201] and the Supreme Court's commands in the immigration

199. The Court's holding in these cases will build upon its recent decisions in *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (holding that no such periodic bond requirement could be read into a separate provision of the INA governing noncitizens detained pending removal proceedings under § 1226), *Demore v. Kim*, 538 U.S. 510, 513 (2003) (upholding mandatory detention without bond hearings under § 1226(c)), and *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (reading an implicit six-month limitation on detention following a final order of removal under § 1231).

200. *See, e.g.*, *Guerrero-Sanchez*, 905 F.3d at 217 n.6 ("Whether Guerrero-Sanchez would be *constitutionally* entitled to a bond hearing under the Due Process Clause is an entirely different question . . . that we need not resolve today . . . ."); *Jennings*, 138 S. Ct. at 851 ("Consistent with our role as a 'court of review, not of first view,' we do not reach [the constitutional] arguments." (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005))); *Zadvydas*, 533 U.S. at 699 ("interpreting the statute to avoid a serious constitutional threat").

201. *See* 18 U.S.C. § 3142(e)(3) (pretrial detention should be ordered only where "no condition or combination of conditions" will protect the community and ensure detainee's appearance at trial).

context that detention should be "carefully limited"[202] to "specially dangerous individuals and subject to strong procedural protections."[203]

The COVID-19 pandemic has magnified the punitive effects of prolonged detention, as well as the lack of recourse available to detainees due to the lack of meaningful, enforceable limits on detention prior to trial or removal. Detention crosses the threshold from regulatory to punitive at an increasingly earlier point, raising procedural due process concerns, given extensive delays in bail hearings and release,[204] as well as substantive concerns in light of detention conditions that shock the conscience.[205] The current statutory framework and jurisprudence have demonstrated both the intractability of the current system in dealing with unprecedented events and the inability to follow any prescribed judicial mechanisms to cope with the COVID-19 pandemic.[206] As a result, district courts throughout the country have scrambled to conjure legal standards to address the unprecedented threat to the life and liberty of detainees in the context of the COVID-19 pandemic.[207]

This Part begins by examining the grave overdetention problem in the United States and argues for evaluation of overdetention claims under a heightened degree of scrutiny. This Part proceeds to argue that the objective-deliberate indifference analysis adopted by the Court in *Kingsley* should be extended to detainees' overdetention due process claims.

A. Pretrial Detention as the Norm, Not the Exception, in the Aftermath of Salerno

The primary justifications supporting the use of pretrial detention in both the criminal and civil contexts are the federal government's regulatory interests in preventing flight and protecting the community.[208] The COVID-19 pandemic has illuminated the massive overuse of pretrial detention and its deviation from its asserted regulatory purpose. Prison officials and attorneys general have been

202. United States v. Salerno, 481 U.S. 739, 755 (1987).

203. *Zadvydas*, 533 U.S at 691.

204. *See supra* notes 21–27.

205. *See supra* note 21.

206. *See* Essien v. Barr, 457 F. Supp. 3d 1008, 1013 (D. Colo. 2020) ("[N]one of the potentially applicable precedents was decided with [the realities of a pandemic] in mind.").

207. *See supra* note 105.

208. *See supra* note 52 and accompanying text.

forced to identify the most pressing justifications for detaining individuals prior to trial in order to deal with the ongoing public health emergency and overwhelmed jails. In an April 2020 memorandum from former U.S. Attorney General William Barr to federal prosecutors throughout the country, Barr recommended "not seeking detention to the same degree we would under normal circumstances—specifically, for those defendants who have not committed serious crimes and who present little risk of flight (but no threat to the public) and who are clearly vulnerable to COVID-19 under [Centers for Disease Control] Guidelines."[209] The question becomes, then, why *anyone* who is neither charged with a serious crime nor considered a flight risk would *ever* be detained prior to trial, as Barr suggests is the case "under normal circumstances."[210] The answer is simple—pretrial detention is no longer the "carefully limited exception" that the *Salerno* Court assumed in recognizing regulatory pretrial detention as constitutional.[211] Instead, pretrial detention is the "normal circumstance[]"[212] for the accused in the United States.

Barr's memo demonstrates that, in many instances, the pretrial detention regime is no longer rooted in the oft-cited justifications of a detainee's dangerousness and risk of flight. Rather, the heightened standard that individuals charged with certain felonies under 42 U.S.C. § 3142(e) must overcome to be eligible for release on bail appears to have transformed into the norm for all detainees seeking bail, rather than the exception for those charged with the most dangerous crimes. The detention of dangerous and nondangerous individuals alike signals that the practice has become "excessive in relation to [the government's purpose]"[213] and punitive—and by extension unconstitutional under the Fifth Amendment.

The transformation of pretrial detention from a regulatory to punitive practice is apparent upon a closer look at *who* is being

209. Memorandum from Att'y Gen. William Barr to All Heads of Dep't Components and All U.S. Att'ys 2 (Apr. 6, 2020) [hereinafter Barr Memo], https://www.justice.gov/file/1266901/download [https://perma.cc/Q67Q-2NSW].

210. *Id.*

211. United States v. Salerno, 481 U.S. 739, 755 (1987).

212. Barr Memo, *supra* note 209.

213. Bell v. Wolfish, 441 U.S. 520, 538 (1979) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

detained prior to trial.[214] One of the greatest explosions in the pretrial detention population is among defendants charged with drug-related offenses,[215] not "individuals who have been arrested for a specific category of extremely serious offenses."[216] In fact, none of the three safeguards that the Court pointed to as support for the facial constitutionality of the Speedy Trial Act's lack of temporal limits—a prompt hearing, limits on detention, or housing detainees apart from convicts[217]—are strictly followed, and they have been largely ignored during the COVID-19 pandemic.[218]

The constitutional harm to detainees is worsened by evaluating their overdetention due process claims under an Eighth Amendment standard designed to guard the convicted against cruel and unusual punishment. Under the Fifth Amendment, detainees may not be punished at all.[219] However, this protection is weaker in substance than in name. Rather, as long as a government actor can point to some rational interest connected to the practice, it will likely pass constitutional muster.[220] Justice John Paul Stevens lambasted this

214. It is impossible to discuss pretrial detention without acknowledging insidious racial bias that has long existed in detention decisions, and the fact that nonwhite individuals are detained at far higher rates than white defendants. For scholarship discussing racial disparities in pretrial detention, see Jones, *supra* note 87, at 942 ("[B]eing Black increases a defendant's odds of being held in jail pretrial by 25%." (quoting Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170, 181 (2005))), and David Arnold, Will Dobbie, & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1929 (2018) (finding that both Black and white judges are racially biased against Black defendants and rely on anti-Black stereotypes that exaggerate dangers of pretrial release of Black defendants as compared to white defendants).

215. *See* COHEN, *supra* note 5, at 4 ("[T]he number of drug defendants detained pretrial increased by 72%, from 13,524 in 1995 to 23,232 in 2010.").

216. *Salerno*, 481 U.S. at 750; *see also* Anthony Barr & Kristen Broady, *Dramatically Increasing Incarceration Is the Wrong Response to the Recent Uptick in Homicides and Violent Crime*, BROOKINGS (Nov. 2, 2021), https://www.brookings.edu/blog/the-avenue/2021/11/02/dramatically-increasing-incarceration-is-the-wrong-response-to-the-recent-uptick-in-homicides-and-violent-crime [https://perma.cc/E7BL-7CWD] (noting that, despite an uptick in violent crimes in the summer of 2020, incarceration rates for homicides and violent crime "peak[ed] in 2007, but have since been falling dramatically" and "in 2019[,] the nation's incarceration rate was the lowest since 1995"); *see also* Jones, *supra* note 87, at 935 (noting that "seventy-five percent of pretrial detainees are charged with relatively minor property crimes, drug offenses or other non-violent acts").

217. *Salerno*, 481 U.S. at 747–48.

218. *See supra* notes 93–96 and accompanying text.

219. *See Bell*, 441 U.S. at 537 (recognizing "a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may" under the Fifth Amendment).

220. *Id.* at 539.

standard in dissent for "provid[ing] an individual with virtually no protection against punishment."[221] Further, Stevens argued that, by creating a framework defined "in the far more permissive terms" of the Eighth Amendment, the Court ignored the protection and commands of the Due Process Clause.[222]

B. Applying the Kingsley *Standard to Pretrial Detention Claims*

One way to ensure that detainees' overdetention claims are viewed with greater rigor by the courts, in light of the special constitutional protections afforded by the Due Process Clause, is for the Court to extend the objective analysis announced in *Kingsley* to pretrial detainees' overdetention due process claims. This analysis asks only whether the detainee's due process rights were violated by the overdetention, and not whether there was punitive intent by prison officials to do so (as mandated by a subjective analysis framed in Eighth Amendment terms).[223] Extending *Kingsley* to detainees' overdetention claims would have the dual effect of resolving the circuit split surrounding the proper analysis for pretrial detainees' overdetention due process claims, as well as recognizing the distinct constitutional footing of the innocent and the guilty that merits a heightened government showing to justify detention. The fact that it is "convenient . . . to apply the same standard to claims" raised by pretrial detainees and convicted prisoners "without differentiation" does not make it constitutional,[224] especially given the weakening of an individual's liberty right upon conviction under the Constitution.[225] Where the interest at stake is an individual's fundamental interest to liberty, convenience should have no role in the analysis.

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221. *Id.* at 585 (Stevens, J., dissenting).

222. *Id.* at 586.

223. *See* Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015) (reasoning that "*Bell*'s focus on 'punishment' does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated").

224. Board v. Farnham, 394 F.3d 469, 478 (7th Cir. 2005). While this quote refers to the Fourteenth Amendment specifically, the Due Process Clause of the Fifth Amendment contains identical language and is interpreted identically by the Supreme Court. *See* Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.").

225. Dist. Att'ys Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 68 (2009) ("A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man.").

The Second, Seventh, and Ninth Circuits have extended *Kingsley* to other types of due process claims, and their reasoning provides a model for how this analysis should operate in the context of overdetention.[226] The Second Circuit concluded that "[a]fter *Kingsley*, it is plain that punishment has no place in defining the *mens rea* element of a pretrial detainee's claim under the Due Process Clause" because "[u]nlike a violation of the Cruel and Unusual Punishments Clause [of the Eighth Amendment], an official can violate the Due Process Clause . . . without meting out any punishment."[227] The Seventh Circuit touched on a similar point, citing *Kingsley*'s explicit acknowledgment that the language and nature of claims under a Fifth and Eighth Amendment analysis are distinct, and holding that punitive intent has no place in the analysis of a detainee's inadequate medical care due process claim.[228] In *Castro v. County of Los Angeles*,[229] the Ninth Circuit cited "the broad wording of *Kingsley*," where "[t]he Court did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally."[230] The "underlying federal right," that of due process, is the same and logically should require the same analysis across all threads of due process, including overdetention claims.

C. Liberty From Excessive Detention Is a Fundamental Right, and Merits Strict Scrutiny When It Has Become Prolonged

While the Court is "reluctant to expand the concept of substantive due process,"[231] it has done so across a variety of unenumerated rights,

226. *See* Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017) (applying the *Kingsley* objective deliberate indifference standard to pretrial conditions of confinement claim); Miranda v. County of Lake, 900 F.3d 335, 352 (7th Cir. 2018) (applying the *Kingsley* objective deliberate indifference standard to pretrial inadequate medical care claims); Gordon v. County of Orange, 888 F.3d 1118, 1124 (9th Cir. 2018) (applying the *Kingsley* objective deliberate indifference standard to pretrial inadequate medical care claims).

227. *Darnell*, 849 F.3d at 35.

228. *County of Lake*, 900 F.3d at 352. By contrast, the Tenth Circuit took the opposite approach and declined to extend *Kingsley* on the grounds that the claim (indifference to a detainee's medical needs) necessarily involved a subjective component. Strain v. Regalado, 977 F.3d 984, 991 (10th Cir. 2020).

229. Castro v. County of Los Angeles, 833 F.3d 1060 (9th Cir. 2016).

230. *Id.* at 1070 (quoting Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015)).

231. Collins v. Harker Heights, 503 U.S. 115, 125 (1992).

including the right to marry,[232] the right to marital privacy,[233] and the right to contraception.[234] "If the 'liberty' protected by the Due Process Clause means anything, it means freedom from physical restraint,"[235] and freedom from prolonged detention belongs to this category of fundamental rights whose deprivation can only be justified by "a very important governmental interest."[236] Treating detainees' overdetention claims through the lens of substantive due process does not require the Court to "expand" substantive due process to a new right—rather, it recognizes the fundamental freedom that a citizen is entitled to unless they have been convicted of breaking the law. This is at the core of the liberty right that substantive due process protects.

At the time *Salerno* was decided, the Court held that pretrial detention was not, on its face, a substantive due process violation where such detention was limited, accompanied by sufficient procedural safeguards, and nonpenal in nature.[237] Notably, the *Salerno* Court emphasized the "compelling regulatory purpose of the [Bail Reform] Act"[238] and the government's "compelling interests [in] regulation of pretrial release"[239] throughout its opinion. The Court's subsequent explication, then, of a rational basis test was arguably illogical. The leniency of a rational basis standard defies common sense where it is meant to apply in "narrow circumstances."[240] This language, coupled with the Court's emphasis on "compelling interests,"[241] sounds much more in line with a requirement that a practice be narrowly tailored to serve a compelling state interest—the strict scrutiny standard.[242]

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232. Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942))). The most notable Supreme Court substantive due process decision of the last decade is arguably *Obergefell v. Hodges*, 576 U.S. 644 (2015), which recognized a fundamental right of same-sex couples to marry via a substantive due process and equal protection analysis, *id.* at 675.

233. Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965).

234. Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972).

235. Schall v. Martin, 467 U.S. 253, 288 (1984) (Marshall, J., dissenting).

236. *Id.*

237. United States v. Salerno, 481 U.S. 739, 755 (1987).

238. *Id.* at 752.

239. *Id.* at 753.

240. *Id.* at 750.

241. *Id.* at 753.

242. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 427 (2010) (describing the strict scrutiny analysis as the "prevailing framework for dealing

Because a substantive due process analysis "is to be tested by an appraisal of the totality of facts in a given case"[243] to determine whether the conduct is "shocking to the universal sense of justice,"[244] there likely will be instances where conditions of confinement have a "mutually enforcing effect" and "produce[] the deprivation" of due process in tandem.[245] Logically, the gravity of harm caused by overdetention is magnified where it both occurs under unconstitutional conditions and is "excessive in relation to" the government's legitimate interest in ensuring detainees' appearance at trial for the vast majority of individuals.[246] Prolonged detention in a jail with deplorable conditions, such as amidst the COVID-19 pandemic, is a prime example of such harm.[247] The Third Circuit recognized the inherent difficulty in isolating its analysis to each of the detainee's two due process claims where they suffered separate constitutional violations that occurred in tandem—prolonged pretrial detention in abysmal conditions of confinement—which aggravated the severity of their overdetention due process claim.[248] The Court's recognition that the substantive due process rights of an individual are violated when an individual is overdetained, especially where that detention accompanies parallel due process right violations, is necessary to frame an analysis that takes into account the totality of the circumstances when reviewing length-of-confinement claims.

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with substantive due process claims" by "identifying a narrow category of liberty interests that are deemed sufficiently 'fundamental' to warrant heightened scrutiny and 'forbids the government to infringe . . . "fundamental" liberty interests *at all* . . . unless the infringement is narrowly tailored to serve a compelling state interest'" (quoting Reno v. Flores, 507 U.S. 292, 302 (1993))).

243. County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998) (quoting Betts v. Brady, 316 U.S. 455, 462 (1942)); *see also* Armstrong v. Squadrito, 152 F.3d 564, 570 (7th Cir. 1998) ("[A]n investigation into substantive due process involves an appraisal of the totality of the circumstances rather than a formalistic examination of fixed elements . . . .").

244. *Lewis*, 523 U.S. at 850 (quoting *Betts*, 316 U.S. at 462).

245. Wilson v. Seiter, 501 U.S. 294, 304 (1991).

246. Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015).

247. *See* Levin, *supra* note 25 (describing overcrowded conditions in ICE facilities during the height of the COVID-19 pandemic).

248. German-Santos v. Warden Pike Cnty. Corr. Facility, 965 F.3d 203, 212–13 (3d Cir. 2020) (reasoning that, where an individual was detained for two-and-a-half years prior to trial "in prison alongside convicted criminals," the court "[could not] ignore the conditions of confinement" that "[d]espite its civil label, [makes] his detention . . . indistinguishable from criminal punishment" (quoting Chavez-Alvarez v. Warden York Cnty. Prison, 783 F.3d 469, 478 (3d Cir. 2015), *abrogated on other grounds by* Jennings v. Rodriguez, 138 S. Ct. 830 (2018))).

D. Rational Basis Review Is Insufficient To Protect Detainees' Due Process Claims

Detainees jailed in both pretrial criminal and immigration detention face the common obstacle of rational basis review—as long as the government can assert a rational basis for the regulation, it will survive a constitutional challenge.[249] The government's interest in protecting the community from suspected dangerous individuals and ensuring an individual's appearance at trial is indisputably "legitimate." However, where "the rules governing detention fail to draw any distinction among those who are detained—suggesting that all may be subject to rules designed for the most dangerous few"—a more demanding level of scrutiny than rational basis review should apply before condemning an individual for weeks, months, or even years prior to trial.[250]

Restoring pretrial detention to its regulatory purpose requires imposing a heightened degree of scrutiny to instances where individuals face prolonged detention prior to a rendering of guilt. The current standard, which evaluates overdetention claims relative to the government's legitimate regulatory purpose, has permitted the narrow "exception" laid out in *Salerno* to swallow the rule.[251] The Court itself has pronounced, "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[252] Given the fundamental nature of the right to be free from overdetention—and the fact that it is intertwined with other "fundamental guarantees," specifically the Sixth Amendment right to a speedy trial and Eighth Amendment

249. *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 712 (D.C. Cir. 2007) ("The rational basis test requires that [the plaintiff] prove that the government's restrictions bear no rational relationship to a legitimate state interest."); FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) ("[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it'. . . ." (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973))); *see also* Bell v. Wolfish, 441 U.S. 520, 585 (1979) (Stevens, J., dissenting) ("The requirement that restraints have a rational basis provides an individual with virtually no protection against punishment.").

250. *Bell*, 441 U.S. at 588.

251. United States v. Salerno, 481 U.S. 739, 747 (1987).

252. Coffin v. United States, 156 U.S. 432, 453 (1895).

prohibition against excessive bail[253]—pretrial detainees' overdetention claims should be evaluated with greater scrutiny than the current rational basis standard.[254]

A strict scrutiny analysis would require the government to assert both a compelling interest to justify the deprivation of the detainee's fundamental right to liberty and that the chosen means—continued detention—are "the most narrowly drawn means" of protecting the public and ensuring the defendant's appearance at trial.[255] This Note uses the courts' treatment of Second Amendment claims—which, depending on the aspect of the right infringed by a regulation, receive varying degrees of scrutiny—as a model for assigning scrutiny that increases in tandem with the length of detention and presence of additional factors, including conditions of confinement.[256]

Jurisprudence surrounding the Second Amendment provides a potential model for how the circuits, lacking clear guidance from the Supreme Court on which tier of scrutiny to apply, could approach detainees' claims. The Court in *District of Columbia v. Heller*[257] rejected rational basis review of regulations burdening the Second Amendment right, but it declined to announce what level of scrutiny alleged violations of the Second Amendment should receive going

253. *See* United States v. Ailemen, 165 F.R.D. 571, 577–78 (N.D. Cal. 1996) (interpreting freedom from "excessive pretrial detention . . . as a right guaranteed by substantive due process" and recognizing its intersection with other "enumerated fundamental rights").

254. *See* Zablocki v. Redhail, 434 U.S. 374, 388 (1978) ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.").

255. *See* Bowers v. Hardwick, 478 U.S. 186, 189 (1986) ("[T]o prevail [under the strict scrutiny standard], the State would have to prove that the statute is supported by a compelling interest and is the most narrowly drawn means of achieving that end.").

256. *See, e.g.*, Heller v. District of Columbia, 670 F.3d 1244, 1266 (D.C. Cir. 2011) ("[W]e apply intermediate scrutiny precisely because the District's laws do not affect the core right protected by the Second Amendment."); United States v. Masciandaro, 638 F.3d 458, 471 (4th Cir. 2011) ("While we find the application of strict scrutiny important to protect the core right of the self-defense of a law-abiding citizen in his home . . . a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home."). Relatedly, courts apply varying levels of scrutiny to First Amendment claims. For example, under the First Amendment, a court will apply strict scrutiny to content-based restrictions. *E.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). By contrast, non-content-based restrictions that incidentally restrict speech, such as time, place, and manner restrictions, receive intermediate scrutiny. *E.g.*, United States v. O'Brien, 391 U.S. 367, 382 (1968).

257. District of Columbia v. Heller, 554 U.S. 570 (2008).

forward.[258] On remand, the D.C. Circuit reasoned that "the level of scrutiny applicable under the Second Amendment surely 'depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.'"[259] Because the District of Columbia's registration requirements did not burden the core of the Second Amendment right,[260] the court applied intermediate scrutiny to the challenged regulations.[261] The majority of circuits have adopted a two-step inquiry to determine the constitutionality of gun regulations, asking first whether the contested regulation burdens a right protected by the Second Amendment (and whether that right lies at the core or periphery of the Second Amendment), and second, whether that regulation survives the appropriate level of constitutional muster based on the nature of the burdened right.[262]

To analogize to the pretrial detention context, an initial determination under the BRA—which survived a facial challenge under rational basis review in *Salerno*—would be subject to more demanding scrutiny when that detention becomes prolonged and "proportionately [harder] to justify."[263] Finally, although not *all* substantive due process rights receive a higher degree of scrutiny than rational basis review,[264] the Court's recognition that liberty from

258. *Id.* at 628 n.27 (reasoning that the rational basis test is appropriate "when evaluating laws . . . that are themselves prohibitions on irrational laws [citing an example of a case under the Equal Protection clause]" but "[o]bviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right").

259. *Heller*, 670 F.3d at 1257 (quoting United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010)).

260. *Id.* at 1258 (applying intermediate scrutiny where "none of the District's registration requirements prevents an individual from possessing a firearm in his home or elsewhere, whether for self-defense or hunting, or any other lawful purpose").

261. *Id.* at 1257 (reasoning that "a regulation that imposes a substantial burden upon the *core* right of self-defense protected by the Second Amendment" demands a stronger justification than a law burdening the periphery of the right (emphasis added)).

262. *See, e.g.*, *id.* at 1252–53 (applying a two-step inquiry under the Second Amendment to determine the constitutionality of the challenged law); Ezell v. City of Chicago, 651 F.3d 684, 701–04 (7th Cir. 2011) (same); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010) (same); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010) (same); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) (same).

263. *Heller*, 670 F.3d at 1245.

264. *See id.* at 1256 (reasoning that "the Supreme Court often applies strict scrutiny to legislation that impinges upon a fundamental right" but "it does not logically follow, that strict scrutiny is called for whenever a fundamental right is at stake"); *cf.* Clark v. Jeter, 486 U.S. 456, 461 (1988) ("[C]lassifications affecting fundamental rights are given the most exacting scrutiny." (citation omitted)); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (applying rational

arbitrary government restraint—such as prolonged detention—lies at "the core of the liberty protected by the Due Process Clause"[265] demands more than the most lenient degree of scrutiny available. Applying heightened scrutiny to prolonged detention claims reflects the Court's "expan[sion of] the meaning of 'liberty' under the Due Process Clause to include certain implied 'fundamental rights' . . . [which] cannot be limited at all, except by provisions that are 'narrowly tailored to serve a compelling state interest.'"[266]

E. Reconciling Due Process with the INA's Mandatory Detention and Postremoval Detention Statutes

Concurring in *Demore*, Justice David Souter emphasized that "selecting a class of people for confinement on a categorical basis," and denying that class any rights to an individual determination of their status was a denial of due process.[267] This is precisely what the INA's mandatory detention statute accomplishes in the pre-removal hearing context.[268] The Supreme Court has twice refused, first in *Demore* and again in *Jennings*, to impose any temporal limitation on the length of mandatory detention without bond in removal proceedings.[269] Meanwhile, the average length of removal proceedings in 2018 was 501 days, or about sixteen and a half months, and decisions granting asylum

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basis review in upholding Washington's minimum wage law, reasoning that "[l]iberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process," and overturning *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), where the Court held that laws restricting the freedom of contract were a violation of substantive due process, *id.* at 561–62).

265. Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

266. Kerry v. Din, 576 U.S. 86, 92 (2015) (quoting Reno v. Flores, 507 U.S. 292, 301–02 (1993)).

267. Demore v. Kim, 538 U.S. 510, 551–52 (2003) (Souter, J., concurring in part and dissenting in part).

268. *See, e.g.*, Casas-Castrillon v. DHS, 535 F.3d 942, 949 (9th Cir. 2008) (requiring a hearing regarding the noncitizen detainee's danger to community and flight risk); Guerrero-Sanchez v. Warden York Cnty. Prison, 905 F.3d 208, 223 (3d Cir. 2018) (finding that the Due Process Clause "*may*" bar prolonged detention where a detainee has no right to a bond hearing (emphasis added)); Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1217 (11th Cir. 2016), *vacating as moot*, 890 F.3d 952 (2018) (reasoning that the one-year mark typically signals the "outer limit of reasonableness" for a noncitizen's detention prior to a bond hearing).

269. *Demore*, 538 U.S. at 527–28 (declining to extend the presumptive ninety-day limit on detention following a removal order in *Zadvydas* to detention prior to a removal hearing); Jennings v. Rodriguez, 138 S. Ct. 830, 844 (2018) (holding that a six-month detention limit cannot be read into statute).

took an average of 1,064 days, or nearly three years.[270] As of May 2018, the Immigration Court had a backlog of 714,067 cases.[271] "Detention under § 1226(a) is frequently prolonged," and "initial removal determination proceedings . . . themselves can take months or *years*."[272] If a detainee is not awarded bond, "[t]here is no administrative mechanism by which [they can] challenge[] [their] detention on the ground that it reached an unreasonable length."[273] This dilemma extends to a noncitizen's detention following a final order of removal that becomes prolonged due to the impossibility of removal, as in *Zadvydas*, or in seeking withholding of removal. Pretrial criminal detainees and noncitizens detained throughout removal proceedings therefore face a similar dilemma—how to raise a due process claim alleging overdetention when neither the Court nor Congress has recognized any temporal limit on such detention.

A substantive due process analysis is appropriate in both detention regimes because it recognizes the need to evaluate overdetention claims on the facts of each individual's detention, rather than via imposition of the type of "bright-line" rule that the Court rejected in *Salerno*, *Demore*, and *Jennings*. Dissenting in *Jennings*, Justice Stephen Breyer highlighted:

> The strongest basis for reading the Constitution's bail requirements as extending to these civil, as well as criminal, cases, however, lies in the simple fact that the law treats like cases alike. And reason tells us that the civil confinement at issue here and the pretrial criminal confinement that calls for bail are in every relevant sense identical. There is no difference in respect to the fact of confinement itself. And I can find no relevant difference in respect to bail-related purposes.[274]

The substantive due process analysis under both regimes is the same—prolonged detention prior to a conviction or order of removal in circumstances that "shock[] the conscience" is a violation of the Fifth

270. *Immigration Court Backlog Jumps While Case Processing Slows*, TRAC IMMIGR. (June 8, 2018), https://trac.syr.edu/immigration/reports/516 [https://perma.cc/3GLR-KRSY].

271. *Id.*

272. Velasco Lopez v. Decker, 978 F.3d 842, 852 (2d Cir. 2020) (emphasis added).

273. *Id.*

274. *Jennings*, 138 S. Ct. at 865 (Breyer, J., dissenting).

Amendment's Due Process Clause.[275] A heightened standard of proof requiring the government, in response to a detainee's challenge on the grounds that their detention is prolonged in violation of due process, to show that it has narrowly tailored a continued detention determination in light of an individual's compelling interest in freedom will return pretrial detention to its regulatory purpose—while still serving the compelling government interest that exists for the "dangerous few"[276] who should be detained prior to trial.

V. PROPOSED FRAMEWORK FOR OVERDETENTION DUE PROCESS CLAIMS

Recognizing a six-month limit on detention following a final removal order, the *Zadvydas* Court reasoned that it was "practically necessary to recognize a presumptively reasonable [limit] of detention . . . for the sake of uniform administration in the federal courts."[277] The creation of a parallel standard for pretrial and pre-removal detention would ease judicial administration of overdetention claims by relieving the burden on judges to derive a new test for each case that comes before the court. While due process claims should continue to be evaluated on a case-by-case basis, establishing rough length-based outlines for assessing overdetention claims can guide, but should not dictate, a court's analysis.

A. Innovation in the District Courts

The model laid out by the U.S. District Court for the Central District of California, which categorizes overdetention claims into three length-based buckets, is a helpful starting point in formulating a new standard.[278] The court first remarked that "the constitutional ban on excessive pretrial detention can be understood as a right guaranteed by substantive due process.[279] Next, the court "infer[red]" in the absence of explicit Supreme Court guidance, that the proper approach

275. United States v. Salerno, 481 U.S. 739, 746 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'" (first quoting Rochin v. California, 342 U.S. 165, 172 (1952); and then quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937))).

276. Bell v. Wolfish, 441 U.S. 520, 588 (1979) (Stevens, J., dissenting).

277. Zadvydas v. Davis, 533 U.S. 678, 680 (2001).

278. United States v. Ailemen, 165 F.R.D. 571, 582 (N.D. Cal. 1996).

279. *Id.* at 577.

involves balancing both the government's regulatory goals in detaining individuals pretrial with the length of that detention and "whether the length of that detention outweighs . . . the interests that have been identified and measured on the government's side of the scales."[280] The court highlighted the Supreme Court's failure to provide guidance as to how to conduct the balancing test, raising the exact questions and frustrations this Note seeks to answer:

> How do we value or ascribe weight to different lengths of confinement? Does that process vary with or depend at all on characteristics or circumstances of the individual defendant (e.g., should it matter whether the defendant is old, ill, or the kind of person who suffers more in confinement than most others)? More significant, when we compare apples (the government's regulatory interests) with oranges (the length of pretrial detention), how do we ascribe *relative* value to each? How do we determine their relative weight? And is the balancing analytically open-minded, or does it start with the scales pre-weighted in some measure (how much?) in favor of the government (whose detention law, *Salerno* and other courts have held, is clearly supportable, in the abstract, by important governmental interests)?[281]

The court first identified "a pattern . . . of analysis and outcome" from the "many decisions where courts of appeals or district courts have tried to solve these problems" in formulating a test to adjudicate overdetention claims.[282] The court recognized that typically, the courts treated overdetention due process claims where the detention had lasted less than one year as unripe.[283] Where pretrial detention had lasted between one to two years, the court cited the three "main factors of the balancing analysis—length of delay, responsibility for unnecessary delay, and flight/dangerousness."[284] Where detention spanned more than two years, the court held that continued detention could only survive a constitutional challenge where the government was not responsible for the delay and special circumstances existed that made the defendant's release an *extraordinary* threat to the public.[285]

280. *Id.* at 578–79.
281. *Id.* at 579.
282. *Id.*
283. *Id.* at 582.
284. *Id.* at 583.
285. *Id.* at 582–83.

B. Proposing a Length-Based Model with Corresponding Tiers of Scrutiny

The test proposed by the California district court reflects a recognition by the court that varying levels of detention warrant varying analyses. While helpfully identifying the "weakness of any case-by-case balancing approach . . . [that] can vest excessive discretion in judges and lead to inconsistent decision-making,"[286] it does not clarify what degree of scrutiny should apply to each class of detainees' claims. Additionally, the court's length-based sorting approach could be overly permissive in certain circumstances by failing to recognize that an individual's fundamental right to be free from overdetention could arise prior to the one-year mark, depending on an array of factors including the charged offense, the detainee's health, conditions of confinement, and the availability of less restrictive means to ensure their appearance at trial and community safety.[287]

Arguably, the first "bucket" in an overdetention analysis should be tightened to the one-hundred-day mark, given the statutory limits on pretrial detention imposed by the Speedy Trial Act and the *Salerno* Court's expectation that this would serve as a bulwark against abuse of prolonged pretrial detention.[288] At this point, a court should be required to demonstrate that the detainee's trial or hearing before an

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286. *Id.* at 580.

287. For example, due to an inability to pay cash bond or meet another condition of bail, an individual could be overdetained where they are "required to spend far more time behind bars pretrial while they are presumed innocent than they will be required to serve after they are convicted and are subject to punishment." *See* Jones, *supra* note 87, at 936. This scenario reflects the need for a more flexible test that recognizes that an overdetention may occur prior to one year.

288. *See* United States v. Salerno, 481 U.S. 739, 747 (1987) (reasoning that "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act"); *see also supra* note 33 and accompanying text. A one-hundred-day period—which is thirty days beyond the threshold for tolling the Speedy Trial Act—mirrors a common threshold of many state speedy trial statutes for detained persons, thereby providing a uniform standard that detainees jailed by state and federal authorities may follow and ensuring that claims are ripe when they are brought. *See, e.g.*, D.C. CODE § 23-1322(h)(1) (2021) (requiring that, in the case of a detained individual, trial commence within 100 days); CAL. PENAL CODE § 1382 (West 2022) (requiring that individuals charged with felonies be brought to trial within 60 days, and those charged with misdemeanors to be brought within 30 to 45 days); PA. R. CRIM. P. 600(B) (limiting time a detainee may spend in detention to 180 days); N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2022) (setting various limits on the delay that a defendant may endure between arrest and trial based on the level of offense, ranging from 30 to 189 days). It additionally reflects that, due to excludable time under the Act, the period between arrest and trial is likely to endure beyond seventy days before the ability to bring a viable challenge arises.

immigration judge is "reasonably foreseeable"—or scheduled within six months—in order to justify continued detention under rational basis review.[289] At the one-year mark—where detention has become prolonged and there is no reasonably foreseeable possibility of release—the government's burden should increase from a legitimate to compelling justification for ongoing detention, as the fundamental right to be free from arbitrary government restraint is invoked.[290] This would require the state to prove "beyond a reasonable doubt" that ongoing detention is warranted after one year.[291]

Beyond the length of detention, courts should also consider other factors that may shift a detainee's due process claim from one bucket into another on an accelerated timeline. For example, the Second and Third Circuits consider the nonspeculative length of future detention, the weight of the inculpatory evidence, the seriousness of the charges, the possibility of a severe sentence, the detainee's criminal history, the extent to which the government bears responsibility for the detention, and any risk of dangerousness or flight if the detainee is released.[292] The Eighth Circuit considers "the size of the detainee's living space,"

289. *See* Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (holding that, after six months of detention with "no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing").

290. *See supra* notes 123–125 and accompanying text. There is evidence that imposing a heightened standard at this stage would not overwhelm the courts, given that an average of 83 percent of felonies—at least at the state level—are resolved within one year and, as a result, the courts would only be tasked with reconsidering detention determinations in the smaller subset of unresolved cases where defendants had not been released on bail. BRIAN J. OSTROM, LYDIA E. HAMBLIN, RICHARD Y. SCHAUFFLER & NIAL RAAEN, NAT'L CNTR. FOR STATE CTS., TIMELY JUSTICE IN CRIMINAL CASES: WHAT THE DATA TELLS US 5 (2020), https://www.ncsc.org/__data/assets/pdf_file/0019/53218/Timely-Justice-in-Criminal-Cases-What-the-Data-Tells-Us.pdf [https://perma.cc/JZF6-GFHX].

291. *See* Kansas v. Hendricks, 521 U.S. 346, 364, 368 (1997) (requiring Kansas to demonstrate that "the detainee satisfies the same standards as required for the initial confinement"—that it is "beyond a reasonable doubt" that the individual was a sexually violent predator—if it wishes to confine an individual longer than one year and requiring "strict procedural safeguards" to ensure constitutionality of civil commitment of sexually violent predators).

292. *See* United States v. Accetturo, 783 F.2d 382, 388 (3d Cir. 1986) (considering "the length of the detention . . . , the complexity of the case," and whether one side has intentionally added to that complexity in order to delay trial); United States v. Gonzales Claudio, 806 F.2d 334, 340 (2d Cir. 1986) ("Though the duration of confinement is obviously a central focus of our [due process] inquiry, we also consider the extent to which the prosecution bears responsibility for the delay that has ensued and the strength of the evidence indicating risk of flight."); United States v. Gallo, 653 F. Supp. 320, 338 (E.D.N.Y. 1986) (considering "length and hardships caused by detention," dangerousness of the defendant, and "any more closely tailored alternative regulatory measure which might be used to secure against the predicted harm in a less restrictive manner").

time spent within that space each day, and opportunity to exercise in weighing the gravity of harm caused by overdetention.[293] The weighing of such factors suggests that overdetention claims should continue to be evaluated on a "case-by-case basis."[294]

The same analysis can be applied to noncitizens' overdetention due process claims. In the wake of *Jennings*, which rejected an implicit six-month time limitation on detention without a bond hearing,[295] the circuits have been reluctant to establish a bright-line rule establishing when detention becomes unconstitutional.[296] Dissenting in *Jennings*, Breyer highlighted the discrepancy in treatment of noncitizens and pretrial criminal detainees that this Note similarly seeks to elevate, finding "no evidence suggesting that asylum seekers or other noncitizens generally present a greater risk of flight than persons imprisoned for trial where there is probable cause to believe that the confined person has committed a crime" and suggesting this determination should be done on a "case by case" basis.[297]

That other factors may worsen the constitutional harm accompanying prolonged detention provides support for a substantive due process analysis that considers the "totality of the circumstances"[298] to determine whether a practice is regulatory or punitive. This analysis should be guided by the "framework for as-

293. Ferguson v. Cape Girardeau County, 88 F.3d 647, 650 (8th Cir. 1996).

294. *See* United States v. Gelfuso, 838 F.2d 358, 359 (9th Cir. 1988) ("[T]he due process limit on the length of pretrial detention requires assessment on a case-by-case basis."); *Gonzales Claudio*, 806 F.2d at 340 ("[T]he due process limit on the duration of preventive detention 'requires assessment on a case-by-case basis, since due process does not necessarily set a bright line limit for length of pretrial confinement.'" (quoting United States v. Salerno, 794 F.2d 64, 78–79 (1986) (Feinberg, CJ., dissenting on other grounds), *overruled by* 481 U.S. 739 (1987))).

295. *See* Jennings v. Rodriguez, 138 S. Ct. 830, 843 (2018) (reasoning that nothing in the text of § 1225(b) "may plausibly be read to contain an implicit 6-month limit").

296. *See, e.g.*, Velasco Lopez v. Decker, 978 F.3d 842, 855 n.13 (2d Cir. 2020) ("This case does not require us to establish a bright-line rule for when due process entitles an individual detained under § 1226(a) to a new bond hearing with a shifted burden."); German Santos v. Warden Pike Cnty. Corr. Facility, 965 F.3d 203, 211 (3d Cir. 2020) (declining to adopt a "bright-line threshold at five months, six months, or one year" in favor of weighing the duration of detention along with the expected length of future detention, reasons for the delay, and whether "the alien's conditions of confinement are 'meaningfully different[ ]' than criminal punishment" (alteration in original) (quoting Chavez-Alvarez v. Warden York Cnty. Prison, 783 F.3d 469, 478 (3d Cir. 2015), *abrogated on other grounds by* Jennings v. Rodriguez, 138 S. Ct. 830 (2018))).

297. *Jennings*, 138 S. Ct. at 865 (Breyer, J., dissenting).

298. *See* Armstrong v. Squadrito, 152 F.3d 564, 570 (7th Cir. 1998) (instructing that "an investigation into substantive due process involves an appraisal of the totality of the circumstances rather than a formalistic examination of fixed elements").

applied constitutional challenges" highlighted by the Third Circuit in a recent post-*Jennings* overdetention case brought by a detainee held under § 1226(c).[299] There, the court inquired into (1) the foreseeable length of future detention, (2) the party bearing responsibility for the delay, and (3) "whether the alien's conditions of confinement are 'meaningfully different[]' from criminal punishment."[300] The court reasoned, "[I]f an alien's civil detention under § 1226(c) looks penal, that tilts the scales toward finding the detention unreasonable. And as the length of detention grows, so does the weight that we give this factor."[301] This framework reflects the analysis proposed above for pretrial criminal detention. Where external factors contribute to the punitive effect of pretrial detention, the constitutionality of such detention is cast into question, and the Government's burden to justify the continued detention of the individual should increase in tandem with the length of their detention.[302]

CONCLUSION

The sheer number of individuals jailed pretrial in conditions defying belief—and microscope on conditions in jails amidst the COVID-19 pandemic—should serve as an impetus for both Congress and the courts to reexamine alternatives to detention and to restore the practice to its regulatory use. The Supreme Court's failure to resolve the due process issue lurking in its recent overdetention decisions has

299. *German Santos*, 965 F.3d at 208.

300. *Id.* at 211 (alteration in original) (quoting *Chavez-Alvarez*, 783 F.3d at 478).

301. *Id.* (citation omitted).

302. An alternative—or ideally, companion to judicial intervention—is bail reform. Although outside the scope of this Note, there is substantial literature on the benefits of eliminating cash bail. *See supra* note 171. Much of this reform has occurred on a local level, as bipartisan efforts in support of bail reform on the federal level—most recently the proposed Smarter Pretrial Detention for Drug Charges Act introduced in the Senate in September 2020—have stalled. *See* Smarter Pretrial Detention for Drug Charges Act of 2020, 116th Congress, S. 4549 (2020). The proposed statute would remove the rebuttable presumption in favor of detaining federal drug offenders pretrial and would allow judges to exercise discretion over this determination for nonviolent drug offenders. *Id.* Although the proposed legislation would provide judges with more discretion in granting bail to *some* detainees, it does not address the overarching problem of restraining or monitoring the *length* of detention for those to whom bail is denied. Judges will continue to adjudicate due process claims alleging overdetention for those detainees to whom the legislation does not extend, unguided by clear precedent or a statutory limit on pretrial detention. As a result, the due process analysis employed by a judge in one circuit may differ significantly from that by judges in another circuit unless the Supreme Court clarifies the proper analysis for overdetention claims. Ultimately it is the role of the Court, not that of Congress, to formulate a uniform test that should guide the analysis into whether detention has exceeded its regulatory mandate and become punitive in violation of the Fifth Amendment's Due Process Clause.

forced judges to guess at the correct analysis in order to reconcile the BRA and INA with the commands of due process under the Fifth Amendment. The widespread use of detention illustrates the failure of the existing precedents to protect individuals' fundamental liberty rights and demands the formulation of a uniform judicial framework to adjudicate detainees' overdetention due process claims.