No. 17-1950

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Francisco Rodriguez-Guardado,

Petitioner-Appellant,

v.

Yolanda Smith, Superintendent of the Suffolk County House of Correction,

Respondent-Appellee.

Appeal from the District Court for the District of Massachusetts, No. 17-11300

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, *Amicus Curiae* the American Civil Liberties Union of Massachusetts certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Since July, Petitioner-Appellant Francisco Rodriguez-Guardado ("Petitioner") has been locked up in immigration detention while awaiting rulings on his petitions to reopen his removal proceedings. The government has struggled mightily to articulate a lawful, non-arbitrary reason for imprisoning a man whom it previously determined posed no danger or flight risk. This is because Petitioner's detention proceeds not from law, but from a new government policy of indiscriminate detention.[1] Petitioner's detention disregards the relevant immigration laws, and its arbitrariness violates due process.

Petitioner has lived in the United States since 2006, has always cooperated with U.S. authorities, has no criminal record, and is the father of four U.S.-citizen children. In 2011, he received a final order of removal. Each year thereafter, Immigration and Customs Enforcement ("ICE") granted his stay applications, which allowed him to continue working and living here with his family. At a June 2017 check-in, however, ICE told Petitioner to return on July 13, 2017. When he complied, he was immediately detained.

As it has apparently done in other cases, the government tried to justify Petitioner's detention by citing a plainly inapplicable regulation.[2] In district court, the government changed course, advancing a sweeping interpretation of the mandatory detention provision of 8 U.S.C. § 1231(a)(2).

The district court accepted that interpretation, holding that Petitioner's *requests* for administrative stays amounted to "conspir[ing] or act[ing] to prevent . . . removal" under 8 U.S.C. § 1231(a)(1)(C), which subjected him to an extension of

[1] *See, e.g.*, *Rombot v. Souza*, -- F. Supp. 3d --, 2017 WL 5178797 (D. Mass. Nov. 8, 2017) (striking down arbitrary detention in a similar case).

[2] *See infra* at 13–15; *Rombot*, 2017 WL 5178797, at *3.

the statute's 90-day mandatory-detention period. The court held in the alternative that 8 U.S.C. § 1231(a)(6), which provides for discretionary detention after the removal period, authorized detention. Finally, it held that Petitioner's detention did not violate due process because it had not yet lasted six months.

The district court's rulings were incorrect, and its decision dismissing Petitioner's *habeas* petition should be reversed.

First, no statute authorizes Petitioner's detention. When a noncitizen is ordered removed, detention is mandatory only during a 90-day "removal period." 8 U.S.C. § 1231(a)(1)(A) & § 1231(a)(2). That period began in July 2011, when Petitioner's removal order became final, and expired 90 days later. Section 1231(a)(1)(C), which applies when a noncitizen "conspires or acts to prevent [his] removal," did not extend Petitioner's detention period. Far from *preventing* the government from removing him, Petitioner simply *asked* the government to stay his removal, which it did. Construing that request as an extension of a *required* detention period would contradict the governing provisions, yield absurd results, and raise serious constitutional concerns.

The district court's alternative statutory holding, that 8 U.S.C. § 1231(a)(6) authorizes Petitioner's detention, was also error. The government did not even argue that it had complied with the regulations governing detention under that provision. The district court reasoned that Petitioner fell within the terms of § 1231(a)(6) and *could have been* detained lawfully under that authority, but relied on an inapplicable regulation.

Second, Petitioner's detention was and is so thoroughly arbitrary that it violates his due process rights. Due process requires detention to bear a "reasonable relation" to permissible government purposes: here, ensuring noncitizens' appearance for removal and protecting the community. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). ICE has already determined that Petitioner poses no danger or

flight risk. His abrupt detention under an inapplicable regulation and his continued custody while his removal is stayed do not satisfy due process.

The district court sidestepped these constitutional problems by holding that, under *Zadvydas*, no due process violation *can* occur until a noncitizen is detained for six months. That was not the holding of *Zadvydas*, which simply construed § 1231(a)(6). As this case illustrates, detention can offend due process for more reasons than its duration. By failing even *to review* the relevant facts of Petitioner's constitutional claim, the district court neglected its most fundamental duty as a *habeas* court. Because his custody lacks a statutory basis and violates due process, Petitioner should be released.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae the American Civil Liberties Union of Massachusetts is a non-profit organization founded in 1920 and dedicated to giving effect to the principles of liberty and equality embodied in the Constitution and laws of the United States. As part of its mission, *Amicus* has litigated numerous cases involving civil rights and liberties, both as direct counsel and *amicus*. *See, e.g.*, *Stamps* v. *Town of Framingham*, 813 F.3d 27 (1st Cir. 2016); *Glik* v. *Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Louhghalam v. Trump*, 230 F. Supp. 3d 26 (D. Mass. 2017). *Amicus* is an affiliate of the (national) American Civil Liberties Union, which litigated Supreme Court cases involving the rights of detained immigrants, as both direct counsel and *amicus*, including in *Jennings* v. *Rodriguez*, No. 15-1204 (U.S.) (pending following re-argument on Oct. 3, 2017), and *Zadvydas* v. *Davis*, 533 U.S. 678 (2001).

Fed. R. App. P. 29(a)(2) authorizes this filing, as all parties have consented.[3]

[3] No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund the preparation or submission of this brief. No person, other than the *Amicus* or its counsel, contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(e).

SUMMARY OF KEY FACTS

Petitioner entered the United States in 2006. JA309. The Board of Immigration Appeals entered a final order of removal against him on July 18, 2011. JA313. Petitioner was placed on supervised release, *see* 8 U.S.C. § 1231(a)(3), and in each of the ensuing years ICE granted stays of removal, JA309; JA313. Petitioner never failed to report to ICE when required, and each year applied for and received work permits. JA309, JA314.

Petitioner has flourished in the community. He has worked at MIT since 2012, and offered employment to others in his own business. JA314. He has never been charged with a crime anywhere in the world and has complied with all immigration laws. JA309, JA312, JA314.

Reporting to ICE in June 2017, Petitioner was instructed to appear at the field office with travel documents and an air ticket the following month. JA313. He complied with the request, and was taken into custody on July 13. *Id.* That same day, he received a Notice of Revocation of Release ("ROR"), executed by Field Office Director Cronen. JA314, JA370–71. The ROR states that "ICE has determined that there is a significant likelihood of your removal in the reasonably foreseeable future in your case" and that Petitioner would be detained "pursuant to 8 CFR 241.13." JA370–71. According to the government, Petitioner was scheduled for "removal from the United States planned for July 20, 2017." JA340–42.

The BIA granted a stay of Petitioner's removal on July 14, 2017. JA310. At that time, the government agreed that "ICE cannot execute the removal order unless the BIA should deny the motion to reopen," and indicated that it did not intend to review Petitioner's detention unless and until the Petitioner's removal proceedings were reopened. JA341. On October 31, 2017, the BIA denied the Motion to Reopen. Pet'r Br. at 1. Petitioner appealed to the Tenth Circuit on November 16, 2017. *Id.* at 8. On November 24, 2017, the Tenth Circuit ordered a temporary stay

of removal pending further briefing. *Rodriguez-Guardado v. Sessions*, No. 17-9553 (10th Cir.).[4]

SUMMARY OF THE ARGUMENT

In this brief, *Amicus* shows that Petitioner's detention is not authorized by the applicable statutes, and violates the Due Process Clause.

I.A. 8 U.S.C. § 1231(a)(1–2) does not authorize Petitioner's detention because his removal period ended six years ago, and his pursuit of lawful, discretionary stays from ICE was not an "act to prevent" removal that "extended" this period.

I.B. 8 U.S.C. § 1231(a)(6) does not authorize detention because the government followed none of the procedures in the relevant regulations.

II.A. The *habeas* court must review whether detention following a final removal order satisfies due process by being reasonably related to statutory purposes.

II.B. The Constitution does not authorize all pre-removal detention for six months, and *Zadvydas* did *not* hold that due process is automatically satisfied where pre-removal detention has not yet reached the seventh month.

II.C. Petitioner's pre-removal detention continues to violate his due process rights, and should immediately be relieved.

[4] On November 22, 2017, this Court also granted a stay pending further order.

ARGUMENT

I. The District Court Erred in Holding Petitioner's Detention Justified Under 8 U.S.C. § 1231.

The claim of authority to detain raised below was a statutory power, conferred on ICE by Congress in § 1231 of Title 8. That section grants no authority to detain this Petitioner.

A. Section 1231(a)(2) Does Not Authorize Petitioner's Detention.

Section 1231(a)(2) provides for a period of mandatory detention, called the "removal period," during which "the Attorney General *shall detain* the alien." (emphasis added). Subsections 1231(a)(1)(A) and (C) prescribe the length of the removal period, beginning, in this case, from July 2011. *See Rodriguez-Guardado v. Smith*, No. 17-cv-11300-RGS (D. Mass.), Dkt. No. 50 ("Order") at 3. The standard removal period is 90 days. 8 U.S.C. § 1231(a)(1)(A). But the period "*shall* be *extended* . . . if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or *conspires or acts to prevent the alien's removal* subject to an order of removal." *Id.* § 1231(a)(1)(C) (emphasis added).

The district court incorrectly held that, by applying annually to ICE for stays of removal, Petitioner "conspire[ed] or act[ed] to prevent [that] removal," thus "extending" his mandatory detention period. Order at 4–7 (quoting 8 U.S.C. § 1231(a)(1)(C)). As Petitioner demonstrated below, and as other judges of the district court have held, the text and structure of § 1231(a)(1)(C) preclude its application to a noncitizen who (1) has lawfully applied to ICE for a discretionary stay of removal; or (2) ICE has chosen to release. Pet'r Br. at 21–27; *see Arevalo v. Ashcroft*, 260 F. Supp. 2d 347, 349–50 (D. Mass. 2003) (vacated on mootness grounds); *Rombot*, 2017 WL 5178789, at *3. If the text were not enough, reading

§ 1231(a) to mandate the detention of an individual whose presence in the United States ICE has *chosen* to allow is an absurd result that would raise serious constitutional concerns.

Statutory construction "begins with the actual language of the provision; we give the text its ordinary meaning." *Desilets v. Wal-Mart Stores, Inc.*, 171 F.3d 711, 714 (1st Cir. 1999). Interpreting Petitioner's applications for stays as "conspir[ing] or act[ing] to prevent … removal" is contrary to the plain meaning of the words "extend" and "prevent," and at odds with the statutory context.

"Extend" means to "expand, enlarge, prolong, widen, carry out, further than the original limit[.]" Black's Law Dictionary 712 (9th Ed. 2009). One can "extend" a time-period if it exists, but not if it has terminated. As an historical fact, Petitioner's removal period was not "extended" in 2011, both because it ended on the 90th day, and because the government placed him on supervised release, which the statute authorized the government to do only *after* the mandatory removal period expired: "[i]f the alien does not leave or is not removed within the removal period" he is subject to supervised release. 8 U.S.C. § 1231(a)(3).[5] For this reason—because ICE had chosen to release the petitioner—the district court in *Rombot* held that "§ 1231(a)(1)(C) is inapplicable." 2017 WL 5178789, at *3.

"Prevention" is a unilateral concept; it occurs when one party obstructs another. "Prevent" means to "keep from happening or existing." *Prevent* Definition, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/prevent (last visited Nov. 28, 2017). The district court held that Petitioner *prevented* ICE from removing him because he persuasively *requested* that

[5] The district court's construction imports to the word "extend"—meaning "prolong"—the notion of beginning something anew. Had Congress intended the removal period to begin anew when the government revokes an alien's release, it would have so stated when it defined the "Beginning of [the removal] period." *See* 8 U.S.C. § 1231(a)(1)(B).

the agency exercise its own power not to remove him. An individual cannot "prevent" government action by asking for its discretion. If Petitioner's stay requests amounted to "prevention," then every defendant who requests a departure "prevents" a court from imposing a guidelines sentence.

This verb is part of a parallel usage, but not the one the district court identified. The district court distinguished "collusive conduct" (conspiracy) from "personal action:" that is, the wrongful from the lawful. Order at 5. But the distinction in the statute is not between wrongful and lawful acts. It is between joint acts and solitary ones—each of which is *necessarily* wrongful. The removal period is extended where the alien (i) "conspires . . . to prevent the alien's removal" or (ii) "acts to prevent the alien's removal[.]" 8 U.S.C. § 1231(a)(1)(C). Neither the concept of unlawful contract to prevent, nor of unlawful unilateral prevention can be wrestled to fit the facts here. A lawful proceeding before an agency cannot be a "conspiracy," because both the applicant and the agency proceed in accordance with law, and a conspiracy requires an illegal contract. *See United States v. Dellosantos*, 649 F.3d 109, 115 (1st Cir. 2011) (defining "conspiracy" as "an agreement . . . to accomplish an unlawful purpose.").[6] If the government's theory is that Petitioner "act[ed] to prevent" by petitioning the agency on his own, that states an impossibility. Acting alone, Petitioner could prevent nothing. He could only request that the *agency* stay removal. There could be and was no stay without the agency's act.

Congress wrote plainly. As demonstrated by the text and structure of § 1231(a)(1)(C), it was concerned with unlawful evasion of removal orders, whether alone or in concert. Petitioner's interpretation of the statute is reinforced by two familiar canons of construction.

[6] If the request for and grant of relief could be thought of as a "contract" at all, by definition they would form a lawful one, and therefore not a conspiracy.

First, statutes may not be construed in a manner that "yield[s] a patently absurd result[.]" *United States v. Fernandez*, 722 F.3d 1, 10 (1st Cir. 2013). In the district court's view, every year that ICE granted an administrative stay of removal and employment authorization so that Petitioner could support his family, it was *required* by § 1231(a)(2) to frustrate the purpose of doing so by holding him.[7]

Second, the district court's construction of § 1231(a)(1)(C) violates the canon of constitutional avoidance. "'It is a cardinal principle' of statutory interpretation [] that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'th[e] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas*, 533 U.S. at 689 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

The district court's construction raises "a serious doubt" as to its constitutionality. *See id.* The express purpose of § 1231(a)(2)'s limited removal period is to facilitate actual removal. *See* 8 U.S.C. § 1231(a)(1)(A). Such mandatory detention is constitutional, if at all, only because limited in duration and scope. *See Demore v. Kim*, 538 U.S. 510, 529–30 (2003). The district court exploded these constitutional bounds. Its construction *requires* the government to detain a person whose case is stayed pending review, even if—like Petitioner—he poses no danger or flight risk. By applying § 1231(a)(2) to individuals with *administrative* stays of removal, the district court would require ICE to imprison everyone whom ICE itself has authorized, pending review, to work in the community in order to support

[7] The district court relied on decisions involving individuals who obtain *judicial* stays of removal in order to allow consideration of a pending petition for review. *See* Order at 6–7 (citing, *e.g.*, *Akinwale* v. *Ashcroft*, 287 F.3d 1050, 1052 n.4 (11th Cir. 2002)). Where *ICE itself* chooses to grant a stay, Petitioner cannot have prevented ICE from releasing him. To the extent that the cases suggest that judicial stays foreclose due process challenges, they are contrary to this Court's decision in *Reid v. Donelan*, 819 F.3d 486, 499–500 (1st Cir. 2016).

their dependents—potentially for years. This absurd construction, which rewards lawful requests for review with *mandatory* detention, without any consideration of the balance of the parties' legitimate interests, raises profound doubts about the statute's constitutionality. *See Oyedeji v. Ashcroft*, 332 F. Supp. 2d 747, 753–54 (M.D. Pa. 2004) (citing *Zadvydas*, 533 U.S. at 690–91) (procurement of a stay of removal during challenge to removal does not impair due process rights).

The district court relied on *Lawrence v. Gonzales*, 446 F.3d 221, 227 (1st Cir. 2006), a case where the petitioner had been convicted of a crime of moral turpitude and ordered removed. Order at 6. *Lawrence* applied § 1231(a)(6), under which detention is discretionary, and did not concern mandatory detention under § 1231(a)(2) at all.[8] 446 F.3d at 227. The Court noted in passing that petitioner's procurement of stays had prolonged his detention, but its decision rested on its removal decision, which rendered a "remand on the issue of the *length* of detention, which has not been requested . . . wholly fruitless." *Id*. (emphasis added).

Section 1231(a)(1)(C) applies not only to noncitizens convicted of a crime, like the petitioner in *Lawrence*, but to *all noncitizens* subject to removal orders. *See* 8 U.S.C. § 1231(a)(1). An "alien's removable status itself," however, "bears no relation to a detainee's dangerous." *Zadvydas*, 533 U.S. at 691–92. The district court's construction would absurdly and unconstitutionally subject all aliens who successfully petition for discretionary stays to mandatory detention—potentially for years on end—without any "special justification" relating to that detention. *See id*. at 690–92.

Here, an alternative construction of the statute that avoids the constitutional question is not only "fairly possible," *id.*, it is textually sound and has already been endorsed by two district courts in this Circuit, *see Rombot*, 2017 WL 5178789, at

[8] The *habeas* claim was not properly before the Court, so its comments concerning the merits were dicta. *Lawrence*, 446 F.3d at 227.

*3; *Arevalo*, 260 F. Supp. 2d at 349. The Court should adopt this alternative construction. Once the removal period expires and an alien is released, the removal period cannot be "extended," and a noncitizen's lawful requests for stays are not grounds for imposing mandatory detention.[9]

B. Section 1231(a)(6) Does Not Authorize Petitioner's Detention.

The district court held in the alternative that Petitioner's detention was warranted by § 1231(a)(6) and the regulations promulgated thereunder. Order at 7–8. Section 1231(a)(6) authorizes discretionary detention beyond the mandatory period under detailed regulations set out in 8 C.F.R. § 241.4. The district court held that Petitioner could be detained without a custody determination—or so much as an informal interview—under 8 C.F.R. § 241.4(g)(4), which excuses the government from making a custody determination when, at the end of removal period, it "is ready to execute an order of removal." Order at 8. That section does not apply six years after the removal period ended and supervised release was granted, and the regulation that could conceivably apply here (§ 241.4(*l*), governing revocation of release), does not justify detention under the facts of this case.

According to its own heading, § 241.4(g) provides rules relating to "aliens *continued* in detention" (emphasis added). That is, it applies to those who are *still in custody* as the initial removal period ends. The rule extends this detention where the alien remains in custody on or about the 90th day, and actual removal is imminent. *See id*. § 241.4(g)(2). Reemphasizing that this is a set of rules applicable to someone not already on supervised release, subsection (5) notes circumstances in

[9] The government retains the power, in certain circumstances, to reimpose detention under § 1231(a)(6), but those circumstances were not present here, as we show below.

which "*release* will be denied" (emphasis added). None of § 241.4(g)'s provisions addresses *reimposing detention on one already on supervised release*.[10]

Here again, the district court's construction of the regulation would impermissibly lead to absurd results and raise "serious doubt" as to its constitutionality. *See Fernandez*, 722 F.3d at 10; *Zadvydas*, 533 U.S. at 689. The district court implicitly held the government "is ready to execute" Petitioner's removal order even though, with stays in effect, the government cannot remove him. Order at 8. Under its holding, noncitizens who have been released may be detained again, without any hearing or procedural safeguards, simply because they are subject to a removal order. If that were the intent of § 241.4(g), there would be no reason to have any of the remaining procedures in the regulation. The government could simply release an alien after the removal period, and then detain him again without any justification. The government could therefore detain without basis any noncitizen who has shown enough merit in its legal position to be entitled to a stay in the first place. After releasing a noncitizen upon an affirmative determination that he presents no flight or public safety risk, *see* 8 C.F.R. § 241.4(e)–(f), the government might then then detain him without any process whatsoever. "The Constitution demands greater procedural protection even for property." *Zadvydas*, 533 U.S. at 692.

The government had authority to respond to changed circumstances following supervised release—but not under § 241.4(g). Its remedy was revocation of release under § 241.4(*l*) ("Revocation of release"). *See Rombot*, 2017 WL 5178789, at *4. Under subsection (*l*), the government could revoke release upon a

[10] In any event, subsection (g)(4) excuses the government from conducting a custody determination *only* when it "is ready to execute an order of removal." Removal in this case having been stayed, the government was and is not "ready to execute."

new "[d]etermination by the Service" that one of four conditions listed in § 241.4(*l*)(2) had been met. That determination *must* have been made by the Executive Associate Commissioner unless "the revocation [wa]s in the public interest and circumstances d[id] not reasonably permit referral of the case," in which case it may have been made by the district director. 8 C.F.R. § 241.4(*l*)(2).

Prior to reaching the district court, the government never articulated a cogent basis for revocation. In 2011, when it determined that Petitioner was not a flight risk or danger to the public, it considered his ties to the community, lack of criminal and psychiatric history, and ability to adjust to life in the community. 8 C.F.R. § 241.4(e)–(f). None of these concerns being present, the government appropriately placed him on supervised release. JA309. It also granted him an employment authorization, for which he was eligible only upon a determination that "the removal of the alien is . . . contrary to the public interest." 8 U.S.C. § 1231(a)(7); *see* JA309, JA314.

In 2017, the government did not suggest that any of these circumstances had changed. Instead, it invoked § 241.13, JA314, JA370, which deals with aliens *who cannot be removed to their native countries*. *See* 8 C.F.R. § 241.13(a); *see also Rombot*, 2017 WL 5178789, at *3; Continued Detention of Aliens Subject to Final Orders of Removal, 66 FR 56967, 2001 WL 1408247 (Nov. 14, 2001). The "stateless" dilemma has never applied to Petitioner. Nothing suggests that his native country has refused to accept him. *See* 8 C.F.R. § 241.13(g). The government never made, because it cannot make, the "requisite finding" for application of § 214.13 that "there is no significant likelihood of removal in the reasonably foreseeable future." *See Rombot*, 2017 WL 5178789, at *3 (quoting 8 C.F.R. § 241.13(a)). The government therefore "relied on an inapplicable regulation in re-

voking [Petitioner]." *Id.* "If ICE intended to revoke [Petitioner's] release, it was required to follow the procedures set out in 8 C.F.R. § 241.4. It did not." *Id.*[11]

First, release was revoked by Field Office Director Cronen, not—as *required* under section 241.4(*l*)(2)—by the Executive Associate Commissioner. JA371.[12] *See* 8 C.F.R. § 241.4(*l*)(2); *Rombot*, 2017 WL 5178789, at *4. Nor does anyone suggest that revocation was made "in the public interest," a threshold determination that must be made before revocation by a lower-ranking officer is permitted. *See* 8 C.F.R. § 241.4(*l*)(2); *Rombot*, 2017 WL 5178789, at *4. In *Rombot*, the petitioner's release was incorrectly revoked by this *same* field office director, once again without any record of the required determination. 2017 WL 5178789, at *4.[13] That court held that this rendered the revocation insufficient to satisfy ICE's own regulations, which "like any agency," it "has the duty to follow[.]" *Id.*

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[11] "Rules issued through the notice-and-comment process . . . have the force and effect of law." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (citation omitted). The rule binds the agency to compliance. *See Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 733 (1982) (citing "the well-established legal principle that a federal agency must comply with its own regulations"); *DGR Assocs., Inc. v. United States*, 690 F.3d 1335, 1340 (Fed. Cir. 2012). Section 241.4 was enacted through the ordinary notice-and-comment procedure prescribed by § 4 of the Administrative Procedure Act, and therefore binds the government. *See* Detention of Aliens Ordered Removed, 65 FR 80281-01, 2000 WL 1860526 (Dec. 21, 2000).

[12] This case presents none of the exigent circumstances that would have permitted referral to a subordinate officer under § 241.4(*l*)(2). In fact, the government appears to have reached its decision (in June) a *month before* its implementation. JA313–14.

[13] The court in *Rombot* found that this Field Office Director's conduct—which included his representation that he had reviewed information submitted by petitioner's counsel even though petitioner had submitted none—"is evidence of ICE's utter disregard for the agency's own procedures." 2017 WL 5178789, at *4.

Second, § 241.4 provides for revocation only when "(i) The purposes of the release have been served; (ii) The alien violates any condition of release; (iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or (iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate." 8 C.F.R. § 241.4(*l*)(2). The record contains no evidence of any of these factors, nor even that the government ever considered them, as "it was required" to do. *See Rombot*, 2017 WL 5178789, at *4. "Based on ICE's violation of its own regulations," Petitioner's "detention was unlawful." *Id.*

II. Detention Violates Petitioner's Rights Under the Due Process Clause.

The district court held that Petitioner's constitutional challenge was foreclosed because his detention had not yet exceeded the "presumptively reasonable removal detention duration of six months" announced by the Supreme Court in *Zadvydas*, and therefore did "not offend due process." Order at 8. This holding misread *Zadvydas* (which construed a statute but did not establish a *constitutional* bright-line rule), abdicated the court's *habeas* jurisdiction, and violated Petitioner's due process rights. In fact, Petitioner's detention violates due process because it is not reasonably related to the purposes of the preventing flight or protecting the community.

A. The Court Must Determine Whether Petitioner's Detention Is Reasonably Related to Purposes of Ensuring His Appearance and Protecting the Community.

The Suspension Clause affirms that the Great Writ "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account." *Boumediene v. Bush*, 553 U.S. 723, 745 (2008). As Chief Justice Marshall put it long ago, "[t]he question [in *habeas*] is, what authority has the jailor to detain him?" *Ex parte Burford*, 7 U.S. 3 Cranch 448, 452 (1806). When an alien claims

that his detention is unconstitutional—even where a *statute* may be construed to authorize that detention—the Due Process Clause requires the *habeas* court to conduct an *individualized* review of an alien's detention. *Boumediene*, 553 U.S. at 779; *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 949 (9th Cir. 2008). Where the detention is unlawful, the *habeas* court should order *immediate* release. *Boumediene*, 553 U.S. at 779; *In re Medley*, 134 U.S. 160, 173–74 (1890) (where Petitioner is "is in custody in violation of the constitution," "under the writ of *habeas corpus* we cannot do anything else than discharge the prisoner from the wrongful confinement").

"[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693.[14] "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Id.* at 690. "[T]he Due Process Clause protects an alien," like Petitioner, "subject to a final order of deportation[.]" *Id.* at 693–94 (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)).

In civil proceedings (including immigration proceedings), due process permits detention only "in certain special and narrow nonpunitive circumstances . . . where a special justification . . . outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690 (citation omitted). Such special justification is present only where a restraint on liberty bears a "reasonable relation" to permissible purposes. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). *See Zadvydas*, 533 U.S. at 690; *Foucha v Louisiana*, 504

[14] *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions [of the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction, without regard to . . . nationality; and the equal protection of the laws is a pledge of the protection of equal laws.").

U.S. 71, 79 (1992). The purpose of the immigration detention provisions at issue here is to "ensur[e] the appearance of aliens at future immigration proceedings and prevent[] danger to the community" during the government's efforts to procure removal. *Zadvydas*, 533 U.S. at 690. Detention may not be arbitrary; the government's interest in this purpose must outweigh the alien's interest in avoiding restraint. *Id.*

These *substantive* limitations on permissible detention are closely intertwined with *procedural* due process protections. *Foucha*, 504 U.S. at 78–80. An individual is entitled to adequate procedures to determine whether a reasonable relationship between those purposes and his detention exist in his case. *See id.* at 79; *Zadvydas*, 533 U.S. 692. Even the dissent in *Zadvydas* emphasized that to satisfy due process, post-final-order detention could not be arbitrary and capricious, and must be accompanied by adequate procedures to determine danger and flight risk. *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting).

The quintessential duty of the *habeas* court is to ensure that these requirements are satisfied. Noncitizens have the right to judicial review of the constitutionality of their detention, even when, as is not the case here, that detention is authorized by statute. *Casas-Castrillon*, 535 F.3d at 949.[15]

The *habeas* court is excused from conducting an individualized review in only very specific and limited circumstances. For example, it may be excused where Congress makes a reasonable determination that some category of noncitizens must be detained for a limited period of time without individual inquiry and provides adequate procedures to allow a noncitizen to contest categorization in that

[15] "Even though Casas' detention is permitted by statute because keeping him in custody *could* serve a legitimate immigration purpose, Casas may nonetheless have the right to contest before a neutral decision maker whether the government's purported interest is *actually* served by detention in his case." *Casas-Castrillon*, 535 F.3d at 949 (emphasis added).

group. *See e.g. Demore*, 538 U.S. at 529–30 (upholding mandatory detention of noncitizens who Congress deemed most likely to pose a danger and flight risk, for a limited period of time, where procedures allowed hearing before an immigration judge to review applicability of statute); *id.* at 531 (Kennedy, J., concurring) ("due process requires individualized procedures to ensure there is at least some merit to [ICE's] charge"). It may also be excused where a noncitizen has received an adequate, individualized determination of danger and flight risk. *See, e.g.*, 8 U.S.C. § 1226(e) (barring *habeas* review of bond determination); *Singh v. Holder*, 638 F.3d 1196, 1203–05 (9th Cir. 2011) (affirming *habeas* review of adequacy of bond procedures).

No such exception applies here. Congress did not mandate Petitioner's detention, and the government conducted no constitutionally-adequate proceeding to determine that Petitioner poses a flight risk or danger. While an "informal interview" unreviewable by a court would not satisfy due process, *see Zadvydas*, 533 U.S. at 692 (suggesting that "the constitutional requirement of due process is a requirement of judicial process"), the government did not provide even that. Again, the "Constitution demands greater procedural protection even for property." *Id.*

Because the regulations provide no "adequate substitute" for independent, judicial review of the reasonableness of detention, the district court was obligated to determine whether Petitioner's detention was reasonably related to detention's legitimate aims. *See Boumediene*, 553 U.S. at 771–79. Determining the legality of that custody in *this* case requires examining the circumstances of the detention in *this* case. *Zadvydas* acknowledged that even "if removal is reasonably foreseeable, the habeas court should consider the risk of the alien's committing further crimes" to determine whether detention is justified. 533 U.S. at 700. Thus, even "within [a] reasonable removal period," the *habeas* court must evaluate the specific detention in light due process requirements. *Id.*

B. *Zadvydas* Did Not Alter These Fundamental Requirements of the Due Process Clause.

Zadvydas did not hold that the Constitution permits six months of detention without judicial inquiry. The case simply construed § 1231(a)(6). It involved noncitizens subject to removal orders who were detained beyond the removal period while the government attempted to remove them. *Zadvydas*, 533 U.S. at 684–86. It answered the question of how long § 1231(a)(6) itself—*not* the Constitution—permitted their detention. *Id.* at 683–84, 688–99. The government argued that § 1231(a)(6) authorized detention indefinitely. *Id.* at 688. The Court disagreed, noting that a "statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Id.* at 690. It found that the statutory text permitted an alternative construction by which the Court could read an "implicit limitation *into the statute*," *id.* at 689 (emphasis added), limiting "an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal," *id*. The Court read—again, it must be emphasized, *into the statute*—a "presumptively reasonable" limit on the period of detention at six months. *Id.* at 701.

Zadvydas therefore did *not* hold that the *Constitution* permits pre-removal detention for a period of up to six months *in all cases*. While the decision contains no holding as to whether the detention of the petitioners in that case was constitutional, it identifies the constitutional *problem*. To satisfy due process, the two goals of § 1231(a)(6)—safeguarding the public and preventing flight—must bear a "reasonable relation to the purpose for which the individual" was detained. *Id.* at 690. Directly contrasting the district court's holding that Petitioner's due process rights were not implicated until he was detained for six months, *see* Order at 8, *Zadvydas* requires judicial inquiry in every case as to whether that "reasonable relation" to detention's purposes exists, and observed that "the alien's removable sta-

tus itself" does *not* present a "special circumstance" that is itself constitutionally sufficient to justify detention, 533 U.S. at 691–92. Yet as the case came to the district court, the government's desire to remove Petitioner was the only circumstance the government cited.

The district court's interpretation of *Zadvydas* contradicts not only the decision itself, but the Suspension and Due Process Clauses. "[A]ny constitutionally adequate habeas corpus proceeding" *must provide* "the prisoner [with] a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 553 U.S. at 779 (quoting *Immigration and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 302 (2001)) (emphasis added). The writ provides "a *prompt and efficacious* remedy for whatever society deems to be intolerable restraints." *Wingo v. Wedding*, 418 U.S. 461, 468 (1974) (emphasis added). Where detention is unlawful, "the individual is entitled to his *immediate* release." *Id*. (emphasis added). The district court's ruling would grant the government a blank check to detain any removable alien, with or without even administrative review, for up to six months. *But see Rombot*, 2017 WL 5178789, at *5 (the Supreme Court "has never given ICE a *carte blanche* to reincarcerate someone without basic due process protection."). There is no basis in constitutional law for an affirmative grant of authority to an administrative body to make determinations impacting fundamental rights without reference to the purposes of the authorizing statute, without any procedural safeguards, and without judicial review. *See Zadvydas*, 533 U.S. at 691–92. Petitioner's detention *is* his injury; the district court's holding would multiply that injury, without opportunity for redress. The Constitution requires more.

C. Petitioner's Detention Is Not Reasonably Related to the Purposes of Ensuring His Appearance and Protecting the Community.

In conducting its review, the *habeas* court may not simply "accept the Government's view[.]" *Zadvydas*, 533 U.S. at 699. The analysis depends on facts.

Because the record is devoid of facts implicating legitimate government interests, no remand is warranted, and the Court may and should order supervised release. To place Petitioner on supervised release in 2011, the government had to determine that he was neither a flight risk nor a threat to public safety. *See* 8 C.F.R. § 241.4(e). Thus, the government *already determined*—over five years ago—that the regulatory goals of § 1231 do not outweigh Petitioner's "constitutionally protected interest in avoiding physical restraint." *Zadyvdas*, 533 U.S. at 690. It renewed that decision annually, allowing Petitioner to remain and work in the community. JA309, JA314. The government has never pointed to any change in the factors governing Petitioner's release. The only explanation it ever offered—concerning Petitioner's supposed failure to comply with requirements of which he had never been informed regarding the date on his air ticket—smacks of arbitrariness, and does not support revocation under either the statute or the regulations. It is not surprising that the government has not relied on it in this litigation.

Because the record presents no facts that could support any legitimate government concern, this Court, in exercising its "core" duty to "review[] the legality of Executive detention," *St. Cyr*, 533 U.S. at 301, should conclude that Petitioner's custody is not reasonably related to the permissible purposes of 8 U.S.C. § 1231(a)(6), and is unlawful.

CONCLUSION

For all of the foregoing reasons, *Amicus* respectfully that the Court should forthwith grant Petitioner's writ, remanding Petitioner to ICE for the imposition of appropriate conditions of release.

Respectfully submitted,

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Dated: December 4, 2017

CERTIFICATE OF SERVICE

I, P. Sabin Willett, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on December 4, 2017.

s/ Sabin Willett
Sabin Willett

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