

No. 25-1223

IN THE
Supreme Court of the United States

KEVIN ISAAC MONTTOYA PALACIOS,
Petitioner,

v.

VERNON LIGGINS, ACTING FIELD OFFICE DIRECTOR,
BALTIMORE, MARYLAND, IMMIGRATION AND
CUSTOMS ENFORCEMENT, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* NEW YORK
LEGAL ASSISTANCE GROUP, *ET AL.*,
IN SUPPORT OF PETITIONER

MICHELLE PALLAK
Counsel of Record
DESIREE GRACE
SCOTT WEINGART
MCCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
(973) 849-4034
mpallak@mccarter.com
Attorneys for Amici Curiae

September 23, 2026

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS	i
TABLE OF CITED AUTHORITIES.....	iii
INTERESTS OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT.....	5
ARGUMENT	7
I. Over the last year, the federal government has unlawfully and unjustifiably detained noncitizens in its effort to expand immigration detention.	9
II. Access to counsel is essential for noncitizens in immigration detention to defend their rights.	17
A. Noncitizens in immigration detention are in a uniquely disadvantaged position that leaves many incapable of asserting—much less vindicating—their rights.	17
B. Amici’s experience illustrates the importance of access to counsel for immigrant detainees	21
C. Data maintained by the federal judiciary underscores the importance of access to counsel for noncitizens in immigration detention.	23

Table of Contents

	<i>Page</i>
III.EAJA is vital in ensuring that courts can efficiently handle the increase in habeas petitions that the Government's Policies have Provoked.....	29
CONCLUSION.....	33

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>A.M.H. v. Warden, Stewart Det. Ctr.</i> , No. 4:25-CV-483-CDL-AGH, 2026 WL 1898963 (M.D. Ga. June 11, 2026)	32
<i>Aghar v. Rokosky</i> , No. CV 26-03691 PHX KML (CDB), 2026 WL 2286855 (D. Ariz. July 23, 2026)	12
<i>Ahmadi v. Bondi</i> , No. 2:26-CV-00811-TLF, 2026 WL 1123514 (W.D. Wash. Apr. 24, 2026)	12
<i>Angel, v. Warden of the Cal. City Corr. Ctr.</i> , No. 1:26-CV-03587-TLN-CSK, 2026 WL 2676077 (E.D. Cal. Sept. 11, 2026)	12
<i>Arostegui-Campo v. Noem</i> , No. 25-CV-3064 JLS (MMP), 2025 WL 3280886 (S.D. Cal. Nov. 25, 2025)	14
<i>Bah v. Tsoukaris</i> , No. CV 25-16925 (JXN), 2025 WL 3041812 (D.N.J. Oct. 31, 2025)	20
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008)	8
<i>Carrillo v. Mason</i> , No. 2:26-CV-00150, 2026 WL 561055 (S.D.W. Va. Feb. 27, 2026)	11

Cited Authorities

	<i>Page</i>
<i>Clark v. Sweeney</i> , 607 U.S. 7 (2025).....	30
<i>Commissioner, INS v. Jean</i> , 496 U.S. 154 (1990).....	5, 9, 17
<i>Dima v. Genalo</i> , No. 26-CV-5258 (AMD), 2026 WL 2718520 (E.D.N.Y. Sept. 15, 2026).....	21
<i>Erickson v. Pardus</i> , 551 U.S. 89 (2007).....	30
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976).....	30
<i>Garrett v. Selby Connor Maddux & Janer</i> , 425 F.3d 836 (10th Cir. 2005).....	30
<i>Garrison G. v. Bondi</i> , 825 F. Supp. 3d 853 (D. Minn. 2026)	14
<i>Haidari v. Scott</i> , No. 2:26-CV-01146-TL, 2026 WL 1194634 (W.D. Wash. May 1, 2026).....	31
<i>Hernandez Alvarez v. Warden</i> , 175 F.4th 1258 (11th Cir. 2026)	12
<i>Hernandez-Polanco v. Noem</i> , No. CV 26-1283 (ZNQ), 2026 WL 657817 (D.N.J. Mar. 9, 2026)	16

Cited Authorities

	<i>Page</i>
<i>Ismail v. Gonzales</i> , 245 F. App'x 366 (5th Cir. 2007)	17
<i>Jimenez Barron v. Warden, N. Fla. Detention Facility</i> , No. 3:26-CV-2263-JEP-PDB, 2026 WL 2794827 (M.D. Fla. Sept. 18, 2026)	12
<i>Johnson v. United States</i> , 576 U.S. 591 (2015)	27, 28
<i>Juan T.R. v. Noem</i> , No. 26-CV-0107 (PJS/DLM), 2026 WL 232015 (D. Minn. Jan. 28, 2026), <i>supplemented</i> , 2026 WL 555601 (Feb. 26, 2026)	16
<i>Kozlova v. Warden of the Cal. City Det. Ctr.</i> , No. 1:26-CV-0499 DJC AC, 2026 WL 1785250 (E.D. Cal. June 22, 2026)	32
<i>Kumar v. Mullin</i> , No. CIV-26-1158-R, 2026 WL 2533143 (W.D. Okla. Aug. 27, 2026)	21
<i>Kuprashvili v. MDC Brooklyn</i> , No. 26-CV-02581 (NRM), 2026 WL 1662197 (E.D.N.Y. June 9, 2026)	31
<i>Lopez Garcia v. Guadian</i> , ___ F.4th ___, ___, No. 25-7044, 2026 WL 2661092 (4th Cir. Sept. 10, 2026)	11

Cited Authorities

	<i>Page</i>
<i>Matter of Yajure Hurtado</i> , 29 I. & N. Dec. 216 (BIA 2025).....	10
<i>Martinez-Gonzalez v. Warden, Alligator</i> <i>Alcatraz</i> , No. 2:26-CV-1730-KCD-NPM, 2026 WL 1558911 (M.D. Fla. June 2, 2026)	31
<i>Matos v. Hardin</i> , 2026 WL 2681994 (M.D. Fla. Sept. 14, 2026).....	13, 15
<i>Mutware Baker v. Figueroa</i> , No. CIV-26-1360-R, 2026 WL 2656557 (W.D. Okla. Sept. 9, 2026)	16
<i>Ndoye v. Joyce</i> , No. 25-CV-8856 (VSB), 2026 WL 306387 (S.D.N.Y. Feb. 5, 2026)	20
<i>Obando Vargas v. Blanche</i> , No. 1:26-CV-05343-DAD-AC (HC), 2026 WL 2056618 (E.D. Cal. July 16, 2026).....	15
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010).....	17
<i>Palencia v. Hermosillo</i> , No. 2:25-CV-02669-BAT, 2026 WL 125141 (W.D. Wash. Jan. 16, 2026)	13

Cited Authorities

	<i>Page</i>
<i>Phongsavanh v. Williams</i> , 809 F. Supp. 3d 864 (S.D. Iowa 2025).....	13, 15
<i>Ramox Calix, v. Warden, Fla Baker Corr. Inst.</i> , No. 3:26-CV-2232-JEP-PDB, 2026 WL 2690657 (M.D. Fla. Sept. 14, 2026).....	12
<i>Rivero Gonzalez v. Warden, Fla. Soft Side S.</i> , No. 2:26-CV-1701-KCD-KRH, 2026 WL 1512341 (M.D. Fla. May 29, 2026).....	31
<i>Rodas Diaz v. Warden of the Cal. City Det.</i> <i>Ctr.</i> , No. 1:26-CV-3021 DJC CSK, 2026 WL 1864515 (E.D. Cal. June 29, 2026).....	32
<i>Rodriguez Romero v. Ladwig</i> , 827 F. Supp. 3d 779 (M.D. La. 2026)	13, 14
<i>Safi v. Chestnut</i> , No. 1:26-CV-5728 DC CSK, 2026 WL 2676854 (E.D. Cal. Sept. 11, 2026)	13
<i>Sarail A. v. Bondi</i> , 803 F. Supp. 3d 775 (D. Minn. 2025)	14
<i>Semer v. Blanche</i> , No. CIV-26-238-SLP, 2026 WL 1427059 (W.D. Okla. May 21, 2026)	16
<i>Singh v. Gonzales</i> , 499 F.3d 969 (9th Cir. 2007).....	17

Cited Authorities

	<i>Page</i>
<i>Sokpa-Anku v. Mullin</i> , No. 1:26-CV-01504 (AJT/LRV), 2026 WL 1878709 (E.D. Va. June 29, 2026)	14
<i>Torres v. Barr</i> , 976 F.3d 918 (9th Cir. 2020)	18
<i>United States v. Chaves-Leiva</i> , 7 82 F. App'x 142 (3d Cir. 2019)	18
<i>United States v. Sineneng-Smith</i> , 590 U.S. 371, 375 (2020)	30
<i>Van Bo v. Bondi</i> , No. CV 3:26-28, 2026 WL 891601 (W.D. Pa. Apr. 1, 2026)	15
<i>Welch v. United States</i> , 578 U.S. 120 (2016)	28
<i>Yohannes v. Chestnut</i> , No. 2:26-CV-01122-JAD-NJK, 2026 WL 1752064 (D. Nev. June 17, 2026)	15
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001)	10, 12, 13, 31

Cited Authorities

	<i>Page</i>
Statutes, Rules, Regulations and Constitutional Provisions	
8 C.F.R. § 241.13(i).....	14
8 C.F.R. § 241.13(i)(3)	14
8 U.S.C. § 1225(b).....	9, 10, 11
8 U.S.C. § 1226	9, 31
8 U.S.C. § 1231	10
8 U.S.C. § 1252(g).....	28
18 U.S.C. § 924(e)(2)(B)	27
28 U.S.C. § 2244(a).....	28
28 U.S.C. § 2255	28
28 U.S.C. § 2255(h)	28
28 U.S.C. § 2412(d)(1)(A)	5, 8
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132	27
Fed. R. Civ. P. 11.....	31
Prison Litigation Reform Act, Pub. L. 104–134.....	27
U.S. Const. Art. I, § 9, cl. 2	8

*Cited Authorities**Page***Other Sources**

- American Immigration Council, *Immigration Detention Expansion in Trump's Second Term* (Jan. 2026), <http://americanimmigrationcouncil.org/wp-content/uploads/2026/01/immigration-detention-report.pdf>.....9, 10
- Department of Immigrations & Customs Enforcement, Detention Statistics FY 2026 YTD, https://www.ice.gov/doclib/detention/FY26_detentionStats07202026.xlsx.....7
- Emma Jansen, *How ICE Hides Detainees From Their Lawyers*, American Prospect (Oct. 6, 2005).....20
- Eric Westervelt, *et al.*, *Mapping ICE's expanding footprint, and the communities fighting back*, NPR (Mar. 23, 2026), <https://www.npr.org/2026/03/23/g-s1-114107/ices-growing-detention-footprint-and-the-communities-fighting-back>.....7
- Executive Office for Immigration Review, Adjudication Statistics: Hearing Language (Oct. 12, 2023), <https://www.justice.gov/eoir/page/file/1508571/dl/>.....18

Cited Authorities

	<i>Page</i>
Federal Judicial Center, Integrated Database (IDB), https://www.fjc.gov/research/idb	24
Fred Zacharias, <i>Lawyers As Gatekeepers</i> , 41 San Diego L. Rev. 1387 (2004)	30, 32
Human Rights First, ICE Flight Monitor: August 2026 Report, https://cdn.sanity.io/files/1e7vpawz/production/996bfbd458f3f6431c2802c1c4db409947c309cc.pdf	19
Jonah Gelbach & David Marcus, <i>A Study of Social Security Litigation in the Federal Courts</i> (July 8, 2016), https://www.acus.gov/sites/default/files/documents/2016.07.28%20Report%20-%20A%20Study%20of%20Social%20Security%20Litigation%20in%20the%20Federal%20Courts.pdf	32
Kyle Cheney, <i>Our running list of judges who have ruled on ICE's mass detention policy</i> , Politico (Feb. 18, 2026; updated June 11, 2026), https://www.politico.com/news/2026/02/18/trump-judges-immigration-detention-00784614	10, 11
Marc Cardona, <i>et al.</i> , Kathryn O. Greenberg Immigration Justice Clinic at Cardozo School of Law, <i>Held Incommunicado: The Failed Promise of Language Access in Immigration Detention</i> (2024), https://cardozo.yu.edu/sites/default/files/2024-08/YU-101%20Held%20Incommunicado.pdf	18

Cited Authorities

	<i>Page</i>
U.S. Immigration & Customs Enforcement, Elizabeth Contract Detention Facility, Friends and Family Visits, https://www.ice. gov/detain/detention-facilities/elizabeth- contract-detention-facility	19

INTERESTS OF AMICI CURIAE¹

Founded in 1990, New York Legal Assistance Group (NYLAG) is a leading civil legal services organization combatting economic, racial, and social injustice by advocating for people experiencing poverty or in crisis. NYLAG's services include comprehensive, free civil legal services, financial empowerment, impact litigation, policy advocacy, and community partnerships. NYLAG represents immigrants in both administrative and judicial proceedings, and also provides assistance through the Pro Se Plus Project, a collaboration of immigration legal services providers that assists immigrants who cannot obtain counsel in advocating for their rights.

In the past year, NYLAG has fought to defend the liberty of immigrants who have been unlawfully detained, filing over 40 petitions for a writ of habeas corpus on behalf of immigrant detainees in federal district court, and assisting family members of detained immigrants in preparing next-friend petitions to file on their family members' behalf. NYLAG is thus intimately familiar with the difficulties detainees have faced in fighting unlawful detention.

¹ No counsel for any party authored this brief in whole or in part. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than Amici, their members, or counsel made have made a monetary contribution to the preparation or submission of this brief.

Central American Legal Assistance (CALA) is a non-profit legal service organization representing asylum seekers at all stages of removal proceedings. CALA has litigated six habeas cases over the past year after its clients were detained following unlawful arrests and anticipates that it will need to continue to do this work for the foreseeable future. CALA's represents its clients pro bono, so the availability of fees under the Equal Access to Justice Act (EAJA) is essential to supporting its work.

Co-Counsel NYC (Co-Counsel) is a nonprofit legal services organization that responds to the complex and evolving legal needs of immigrant communities. Co-Counsel's attorneys have handled thousands of cases involving immigration relief. Through training, supervision, and co-counseling, Co-Counsel supports attorneys, paralegals, and community advocates as they respond to the legal needs of their communities. Co-Counsel has robust experience representing immigrants detained by ICE, including filing habeas petitions in federal district courts. The availability of fees under EAJA directly impacts Co-Counsel's ability to continue representing non-citizens in habeas petitions.

The Legal Aid Society's (LAS) over 2,300 staff members tirelessly advocate for those in New York City who are least able to advocate for themselves, guided by the fundamental principle that nobody should be denied justice because of poverty. In the last year, LAS's Immigration Law Unit assisted in over 5,700 individual legal matters benefiting over 15,500 New Yorkers. Staff represent noncitizens before administrative agencies and federal courts. In the past year, LAS has filed over 50 habeas petitions on

behalf of noncitizens. LAS routinely seeks attorneys' fees following successful habeas actions, in recognition of the significant resources devoted to that representation.

Legal Services NYC (LSNYC) is the largest civil legal services provider in the United States. Its more than 700 staff members assist over 100,000 low-income New Yorkers across a broad range matters, including immigration. Since 2025, LSNYC has represented individuals in immigration detention and filed petitions for writs of habeas corpus to secure their release. Through this work, LSNYC has witnessed firsthand the profound consequences of detention for its clients and their families and the critical role of judicial review in protecting individual liberty. Because LSNYC devotes a significant portion of its resources to this practice, it also has a strong interest in recovering attorneys' fees for the hours its attorneys devote to this work, helping sustain its capacity to represent individuals in immigration detention.

Make the Road New Jersey (MRNJ) is a community-based organization that builds the power of immigrant communities through community organizing, legal and support services, policy innovation, and education. Since 2014, MRNJ has provided legal services and educational programming to hundreds of thousands of immigrant families and represented immigrant community members in removal proceedings and in their affirmative petitions for relief. In the past year and a half, in light of the massive expansion of immigration enforcement and detention, MRNJ has received dozens of calls

each month from community members seeking legal support for detained loved ones.

The New Jersey Consortium for Immigrant Children (NJCIC) is a statewide legal services and policy advocacy organization dedicated to empowering young immigrants. NJCIC serves as the intake and referral hub for New Jersey's Legal Representation for Children and Youth Program and receives hundreds of referrals each year for children and youth at high risk of detention or deportation. NJCIC screens these young people to assess their legal needs and provides them with free legal representation in immigration matters or refers them to peer legal service providers. Additionally, through its Rapid Response Initiative, NJCIC provides direct representation, advice and counsel, pro se assistance, and targeted referrals for youth in Immigration and Customs Enforcement (ICE) detention or at high risk of detention. In the last year, NJCIC's Rapid Response Initiative has provided numerous children in ICE detention in need of a writ of habeas corpus with legal screenings, representation, or direct referrals to pro bono counsel.

The Political Asylum/Immigration Representation Project (the PAIR Project) is a Boston-based non-profit organization and the leading provider of pro bono legal services to indigent asylum-seekers and immigrants detained in Massachusetts. The PAIR Project has represented indigent noncitizens unlawfully detained by ICE, and has filed petitions for a writ of habeas corpus for approximately 200 noncitizens. These petitions have been overwhelmingly successful, and a number of them have resulted in an award of fees under EAJA. These

fees enable the PAIR Project to continue to provide crucial *pro bono* legal services for indigent detainees who would otherwise forgo seeking legal relief due to their inability to pay for private counsel.

UnLocal, Inc. is a community-centered non-profit organization that provides legal representation and community education to New York City's immigrant communities. UnLocal regularly files habeas petitions in federal district courts on behalf of immigrants who have been unlawfully detained.

SUMMARY OF ARGUMENT

The Equal Access to Justice Act ("EAJA") allows a party that prevails in "any civil action" against the federal government to recover attorney's fees if the government's position was not substantially justified.² The plain language of EAJA resolves the question presented in this case: habeas corpus is a "civil action," so EAJA's fee-shifting provision applies.

Moreover, it is difficult to imagine a set of circumstances under which EAJA fees better advance Congress's purpose in enacting the statute: "to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions."³ In the last year and a half, the federal government has significantly expanded immigration detention, and not always in a lawful manner. Many of those caught up in the government's recent surge

² 28 U.S.C. § 2412(d)(1)(A).

³ *Commissioner, INS v. Jean*, 496 U.S. 154, 164 (1990).

in immigration detention have challenged their confinement by filing habeas corpus petitions in federal district courts. In many of these cases, the government has offered no substantial defense for unlawfully detaining the petitioner. Federal district courts have rejected the government's positions in the vast majority of these cases, and on multiple occasions have described arguments the government has made as frivolous.

EAJA is particularly important to noncitizens facing unjustified and unlawful detention. Noncitizens in immigration detention face unique obstacles to asserting their own rights in federal court, including language barriers, an esoteric body of law, limited access to friends and family who can help with preparing and filing a petition, transfers to places far from home, and procedural complexities. These barriers to proceeding pro se mean that, for many noncitizens, the only way they can fight their unlawful detention is by obtaining counsel. Amici's experience in the past year litigating habeas cases underscore both the difficulties that immigrant detainees face in proceeding pro se and the fact that legal representation can make the difference between liberty and continued unlawful detention.

Case data maintained by the federal courts confirms not only the importance of obtaining counsel to noncitizens in immigration detention, but the fact that the demand for legal representation exceeds the supply. Habeas petitioners with counsel do better and have their petitions resolved sooner than those that proceed pro se. Consistent with amici's experience that many detainees find proceeding without an attorney impossible, pro se petitioners represent a

small minority of those that have sought habeas corpus relief since the surge in immigrant detention began. And the level of success pro se petitioners have nevertheless achieved suggests that many detainees who have not been able to retain counsel or file a pro se petition likely also have a viable claim that their detention is unlawful.

Finally, by incentivizing attorneys to represent noncitizens challenging unlawful detention, EAJA promotes judicial efficiency. When counsel files a petition on behalf of a detainee, the court can focus on deciding the issues presented. Moreover, attorneys perform a screening function, filtering out nonviable claims that a pro se litigant might bring. EAJA fees encourage attorneys to represent detainees and create incentives that promote this screening function.

ARGUMENT

Over the past year and a half, the current administration has expanded immigrant detention to levels “not seen since the mass incarceration of Japanese Americans and nationals during World War II.”⁴ The administration has accomplished this

⁴ Eric Westervelt, *et al.*, *Mapping ICE's expanding footprint, and the communities fighting back*, NPR (Mar. 23, 2026), <https://www.npr.org/2026/03/23/g-s1-114107/ices-growing-detention-footprint-and-the-communities-fighting-back>; *see also* Department of Immigrations & Customs Enforcement, Detention Statistics FY 2026 YTD, https://www.ice.gov/doclib/detention/FY26_detentionStats07202026.xlsx.

largely by unlawfully detaining noncitizens who, in the past, would have been (and many of whom in fact have been) released. Many of those newly detained have challenged their detention through the only vehicle available to them: a petition for a writ of habeas corpus, an instrument that the Framers deemed so “vital” to securing “freedom from unlawful restraint” that they enshrined it in the Constitution.⁵ Amici have represented or otherwise assisted many of these noncitizens in fighting their unlawful detention. Their experience, particularly over this past year, has identified one factor that, more than any other, influences whether and how quickly an unlawfully detained noncitizen can secure their liberty: whether that person is represented by counsel.

The noncitizens who have challenged their detention over the past year have been remarkably successful. *See infra* § II(C). Many of their attorneys, including amici and Petitioner’s counsel here, have sought fees under EAJA, which provides that “a court shall” award fees to a party that prevails in “any civil action (other than cases sounding in tort) ... brought by or against the United States ... unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.”⁶ A petition for a writ of habeas corpus is, unambiguously, a “civil action,” so counsel for a habeas petitioner is entitled to fees if the

⁵ *Boumediene v. Bush*, 553 U.S. 723, 739 (2008); U.S. Const. Art. I, § 9, cl. 2.

⁶ 28 U.S.C. § 2412(d)(1)(A).

other criteria for an award are met.⁷ Moreover, allowing fees to counsel for habeas petitioners would serve EAJA’s “specific purpose,” namely, “to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions.”⁸

I. Over the last year, the federal government has unlawfully and unjustifiably detained noncitizens in its effort to expand immigration detention.

Amici’s clients have been swept up in an unprecedented expansion of immigration detention. Two changes in policy have largely triggered this expansion, and shaped the challenges to detention that have ensued.

First, the government has expanded detention of noncitizens in removal proceedings. Initially, this was accomplished by limiting discretionary release on recognizance.⁹ But, in September 2025, in a reversal of nearly three decades of established practice, the government began refusing to hold bond hearings pursuant to 8 U.S.C. § 1226 for a broad class of noncitizens in removal proceedings. Specifically, the government reversed its longstanding interpretation of 8 U.S.C. § 1225(b), a mandatory detention provision previously interpreted as applying only to noncitizens detained at the border or a port of entry,

⁷ Br. of Pet. 15–34.

⁸ *Jean*, 496 US at 164.

⁹ American Immigration Council, *Immigration Detention Expansion in Trump’s Second Term* 18–20 (Jan. 2026), <http://americanimmigrationcouncil.org/wp-content/uploads/2026/01/immigration-detention-report.pdf>

by applying it to almost every noncitizen who entered the United States without being admitted or paroled.¹⁰

Second, the government has increased detention of noncitizens who are subject to a final order of removal that the government cannot execute.¹¹ Noncitizens with a final order of removal are not subject to detention under either § 1225(b) or § 1226; rather, their detention is governed by a different section of the INA, 8 U.S.C. § 1231. This Court addressed prolonged detention under § 1231 in *Zadvydas v. Davis*.¹² *Zadvydas* held that, once a noncitizen is subject to an otherwise enforceable final order of removable, the government may detain that individual for up to six months while attempting to accomplish the removal.¹³ Detention beyond six months is permissible only “until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.”¹⁴ Thus, “[a]fter this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable

¹⁰ See *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025); see also Kyle Cheney, *Our running list of judges who have ruled on ICE’s mass detention policy*, Politico (Feb. 18, 2026; updated June 11, 2026), <https://www.politico.com/news/2026/02/18/trump-judges-immigration-detention-00784614>.

¹¹ American Immigration Council, *Immigration Detention Expansion in Trump’s Second Term*, *supra* n.9, at 20.

¹² 533 U.S. 678, 679 (2001).

¹³ *Id.* at 701.

¹⁴ *Id.*

future, the Government must respond with evidence sufficient to rebut that showing.”¹⁵

The government has fared poorly in its efforts to defend these policy changes and the resulting detentions in the federal courts. By sheer numbers, it has lost far more than it has won. *See infra* § II(C). And on countless issues, courts have rejected the government’s positions. An overwhelming majority of courts, including nine of the eleven numbered circuits, have rejected the government’s expansion of § 1225(b).¹⁶ Even in districts and divisions where every sitting judge rejected the government’s interpretation of § 1225(b), the government has continued detaining noncitizens without providing bond hearings.¹⁷ Indeed, even in circuits that held months ago that detainees arrested in the interior are

¹⁵ *Id.*

¹⁶ *See Lopez Garcia v. Guadian*, __ F.4th __, __, No. 25-7044, 2026 WL 2661092, at *5 (4th Cir. Sept. 10, 2026) (completing, and cataloguing, the current circuit split); *see also* Cheney, *supra* n. 10 (“District court judges appointed by every president since Ronald Reagan have overwhelmingly agreed [with detainees challenging their detention], rejecting the new policy.”). Petitions for certiorari presenting this issue have been filed and fully briefed in *Buenrostro-Mendez v. Blanche*, No. 26-43, *Putra v. Lopez-Campos*, No. 25-1415, and *Rhoney v. Barbosa da Cunha*, No. 26-104.

¹⁷ *See Carrillo v. Mason*, No. 2:26-CV-00150, 2026 WL 561055, at *4 (S.D.W. Va. Feb. 27, 2026) (expressing frustration at the government’s continued application of mandatory detention policy—and thus forcing detainees held in certain regional jails to continue filing habeas petitions—even after every judge in the relevant divisions within the district had rejected the government’s position).

generally entitled to bond hearings, at least some detainees still have to file a habeas petition in order to get the bond hearing to which the government has conceded circuit precedent entitles them.¹⁸

In many cases involving post-final order of removal detention, the government has offered factually or legally deficient arguments that courts have readily, and repeatedly, rejected. In some cases raising *Zadvydas* claims, the government has offered nothing more than “generalized assertions to meet the *Zadvydas* requirement that removal is likely in the reasonably foreseeable future.”¹⁹ In others, it has

¹⁸ See, e.g., *Jimenez Barron v. Warden, N. Fla. Detention Facility*, No. 3:26-CV-2263-JEP-PDB, 2026 WL 2794827, at *1 (M.D. Fla. Sept. 18, 2026) (granting relief to noncitizen detained for almost a month, where the government conceded that *Hernandez Alvarez v. Warden*, 175 F.4th 1258 (11th Cir. 2026), controlled); *Ramox Calix, v. Warden, Fla Baker Corr. Inst.*, No. 3:26-CV-2232-JEP-PDB, 2026 WL 2690657, at *1 (M.D. Fla. Sept. 14, 2026) (ordering bond hearing after government conceded that *Hernandez Alvarez* controlled).

¹⁹ *Aghar v. Rokosky*, No. CV 26-03691 PHX KML (CDB), 2026 WL 2286855, at *10 (D. Ariz. July 23, 2026), *report and recommendation adopted*, 2026 WL 2284218 (Aug. 7, 2026); see also *Angel, v. Warden of the Cal. City Corr. Ctr.*, No. 1:26-CV-03587-TLN-CSK, 2026 WL 2676077, at *3 (E.D. Cal. Sept. 11, 2026) (granting petition where respondents “provide[d] no evidence of efforts to remove Petitioner,” a Cuban citizen who could not be removed to Cuba pursuant to final order of removal “to Mexico beyond repeatedly seeking consent from Petitioner”); *Ahmadi v. Bondi*, No. 2:26-CV-00811-TLF, 2026 WL 1123514, at *3 (W.D. Wash. Apr. 24, 2026) (granting petition where ICE asserted it was “reviewing whether third country removal is available,” but failed to “identify any specific countries as candidates for removal, identify communications with other countries, or provide an estimated timeline for removal”).

not responded to the *Zadvydas* claim at all.²⁰ In still others, it has argued that 8 U.S.C. § 1252(g), a provision that predates this Court’s decision in *Zadvydas*, strips district courts of jurisdiction over *Zadvydas* claims, an argument that a recent district court decision described as “frivolous.”²¹

Many petitioners asserting *Zadvydas* claims have been re-detained by ICE after release under an Order of Supervision (or OSUP), despite fully complying with the OSUP.²² Often, those re-detained by ICE have been living in the United States with a final order of removal and an OSUP for years, if not decades,²³ and many of them had obtained and maintained employment authorization during their supervised release.²⁴

²⁰ See, e.g., *Safi v. Chestnut*, No. 1:26-CV-5728 DC CSK, 2026 WL 2676854, at *4 (E.D. Cal. Sept. 11, 2026) (“In this case, respondents did not address *Zadvydas* at all, and did not argue that petitioner’s removal is reasonably foreseeable.”).

²¹ *Matos v. Hardin*, 2026 WL 2681994, at *2 (M.D. Fla. Sept. 14, 2026).

²² See *Phongsavanh v. Williams*, 809 F. Supp. 3d 864, 869 (S.D. Iowa 2025) (noting—in November 2025—“numerous recent habeas cases involving re-detained noncitizens released on supervision”).

²³ See, e.g., *Rodriguez Romero v. Ladwig*, 827 F. Supp. 3d 779, 788 (M.D. La. 2026) (granting relief to four petitioners who were released on supervision in 1997, 2004, 2023, and 2024).

²⁴ See, e.g., *Rodriguez Romero*, 827 F. Supp. 3d at 788 (noting that two of four petitioners “maintained employment authorization” until re-detention); *Palencia v. Hermosillo*, No. 2:25-CV-02669-BAT, 2026 WL 125141, at *2 (W.D. Wash. Jan. 16, 2026).

To revoke an OSUP and re-detain such a noncitizen, ICE’s own regulations require it to find either (1) a violation of supervised release or (2) changed circumstances resulting in a determination that there is a “significant likelihood” of the noncitizen’s removal “in the reasonably foreseeable future.”²⁵ Moreover, it must notify the noncitizen “of the reasons for revocation of his or her release” and conduct an “initial informal interview promptly after” re-detention to afford the noncitizen “an opportunity to respond to the reasons for revocation stated in the notification.”²⁶ Yet, ICE regularly fails to comply with these requirements, often issuing Notices of Revocation with nothing more than conclusory boilerplate findings of changed circumstances, and sometimes failing to provide such a notice at all.²⁷ “In

²⁵ 8 C.F.R. § 241.13(i).

²⁶ 8 C.F.R. § 241.13(i)(3).

²⁷ See, e.g., *Rodriguez Romero*, 827 F. Supp. 3d at 793–95 (noting that one petitioner was not provided Notice of Revocation, and three were provided Notices of Revocation that offered only “conclusory” assertions of changed circumstances); *Garrison G. v. Bondi*, 825 F. Supp. 3d 853, 857 (D. Minn. 2026) (granting petition where the government “offered no reasons at all for revoking” OSUP, “whether in a notice to [petitioner] or in written submissions in this action.”); *Arostegui-Campo v. Noem*, No. 25-CV-3064 JLS (MMP), 2025 WL 3280886, at *1 (S.D. Cal. Nov. 25, 2025) (granting relief where petitioner was “given a Notice of Revocation of Release with the standard language, ‘This decision has been made based on a review of your official alien file and a determination that there are changed circumstances in your case.’”); *Sokpa-Anku v. Mullin*, No. 1:26-CV-01504 (AJT/LRV), 2026 WL 1878709, at *4 (E.D. Va. June 29, 2026) (granting petition where ICE “failed to cite adequate changed circumstances to warrant revocation under § 241.13(i)(2),” “failed to provide adequate notice of the reasons

the substantial majority of these cases, courts have granted relief after finding that the government failed to identify sufficient changed circumstances or demonstrate a significant likelihood of removal in the reasonably foreseeable future.”²⁸

The government has tested the patience of many district court judges in immigration habeas cases over the past year with dubious legal arguments and inconsistent compliance with court rules and orders. In numerous cases, district courts have chastised government attorneys for making “frivolous” legal arguments,²⁹ and criticized them for wasting judicial

for revocation,” and presented “no evidence DHS ever provided the informal interview” that § 241.13(i)(e) requires); *Sarail A. v. Bondi*, 803 F. Supp. 3d 775, 787 (D. Minn. 2025) (granting relief where Notice of Revocation “informed Petitioner that ‘changed circumstances’ created ‘a significant likelihood of removal in the reasonably foreseeable future,’” without stating what the changed circumstances were).

²⁸ *Phongsavanh*, 809 F. Supp. 3d at 869.

²⁹ See, e.g., *Matos*, 2026 WL 2681994, at *2; *Obando Vargas v. Blanche*, No. 1:26-CV-05343-DAD-AC (HC), 2026 WL 2056618, at *2 (E.D. Cal. July 16, 2026) (argument that petitioner’s refusal to voluntarily depart to third country to which he had no obligation to go was “frivolous”); *Yohannes v. Chestnut*, No. 2:26-CV-01122-JAD-NJK, 2026 WL 1752064, at *2–3 (D. Nev. June 17, 2026) (observing that, rather than answering the petition as ordered, “[t]he government chose instead to file a deficient and frivolous motion to dismiss,” which contained one sentence of legal argument); see also *Van Bo v. Bondi*, No. CV 3:26-28, 2026 WL 891601, at *4 (W.D. Pa. Apr. 1, 2026) (noting that “it is unclear whether or to what extent Respondents’ counsel examined or investigated the assertions made therein, or whether she, herself, believes that they are accurate,” and reminding Respondents’ counsel of her “obligations under the Pennsylvania Rules of Professional

resources.³⁰ And courts have called out widespread and repeated violations of orders entered in habeas cases.³¹

The government’s detention of countless noncitizens, the positions it has taken opposing the habeas petitions they have filed, and its conduct in many of those actions lack any substantial justification. The habeas petitions that have inevitably flowed from the government’s aggressive and haphazard expansion of immigration detention involve precisely the sort of claims to redress

Conduct” to refrain from taking frivolous positions in litigation and knowingly offering false evidence).

³⁰ See, e.g., *Mutware Baker v. Figueroa*, No. CIV-26-1360-R, 2026 WL 2656557, at *1 (W.D. Okla. Sept. 9, 2026) (“Respondents’ counsel is cautioned that incorrect factual assertions waste the Court’s time and can be particularly detrimental to pro se petitioners.”); *Semer v. Blanche*, No. CIV-26-238-SLP, 2026 WL 1427059, at *3 (W.D. Okla. May 21, 2026) (“Respondents are admonished not to waste the Court’s limited judicial resources due to their failure to adequately follow the Court’s instructions and accurately brief the facts of its case.”).

³¹ See, e.g., *Juan T.R. v. Noem*, No. 26-CV-0107 (PJS/DLM), 2026 WL 232015, at *1 (D. Minn. Jan. 28, 2026) (“ICE has likely violated more court orders in January 2026 than some federal agencies have violated in their entire existence.”), *supplemented*, 2026 WL 555601, at *3–25 (Feb. 26, 2026) (cataloguing violations of 210 court orders); *Hernandez-Polanco v. Noem*, No. CV 26-1283 (ZNQ), 2026 WL 657817, at *2 (D.N.J. Mar. 9, 2026) (“[T]he Government’s continued violations of this Court’s orders, including the order enjoining transfer and requiring a timely bond hearing in this matter, is indicative of an ongoing disregard for the Due Process rights of habeas petitioners and of the Government’s duties and responsibilities to this Court.”).

“governmental misconduct” that EAJA was enacted to incentivize.³²

II. Access to counsel is essential for noncitizens in immigration detention to defend their rights.

A. Noncitizens in immigration detention are in a uniquely disadvantaged position that leaves many incapable of asserting—much less vindicating—their rights.

Individuals detained in immigration facilities face a unique set of challenges in asserting their own rights in court, beyond those faced by those in government custody more generally. Pro se litigation is simply not a viable option for many noncitizens unjustifiably detained by ICE. Thus, for them, the ability to access counsel determines whether or not they can obtain freedom from unlawful detention.

Legal Complexity. This Court has observed that “[i]mmigration law can be complex, and it is a legal specialty of its own.”³³ Lower courts agree: “The maze of immigration statutes and amendments is notoriously complicated and has been described as second only to the Internal Revenue Code in complexity.”³⁴ The Immigration and Nationality Act

³² *See Jean*, 496 U.S. at 165.

³³ *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).

³⁴ *Singh v. Gonzales*, 499 F.3d 969, 980 (9th Cir. 2007) (internal quotation marks and citation omitted); *accord Ismail v. Gonzales*, 245 F. App’x 366, 368 (5th Cir. 2007) (“[F]ederal immigration laws are exceedingly complex.” (internal quotation marks and citation omitted)).

has been described as a “morass” and, in more mythical terms, a “Gordian knot” and “King Minos’s labyrinth in ancient Crete.”³⁵ The esoteric nature of immigration law poses a particular challenge to prose litigants who may find “[i]mmigration laws and procedures ... highly confusing.”³⁶ What is more, the law governing immigrant detention in particular has been evolving at such a pace that even practitioners in the area can struggle to keep up.

Language Barriers. Language barriers also significantly constrain immigration detainees’ ability to advocate for their rights. The federal government’s own data reflects that the vast majority of immigration court hearings require foreign language interpretation.³⁷ Preparing a petition for a writ of habeas corpus in federal court is beyond the capability of an average immigration detainee. Moreover, law libraries in immigration detention facilities often fail to provide the language assistance services that detainees need to advocate for themselves in court.³⁸

³⁵ *Torres v. Barr*, 976 F.3d 918, 924 (9th Cir. 2020).

³⁶ *United States v. Chaves-Leiva*, 782 F. App’x 142, 147 n.3 (3d Cir. 2019).

³⁷ See Executive Office for Immigration Review, Adjudication Statistics: Hearing Language (Oct. 12, 2023), <https://www.justice.gov/eoir/page/file/1508571/dl/>.

³⁸ See Marc Cardona, *et al.*, Kathryn O. Greenberg Immigration Justice Clinic at Cardozo School of Law, *Held Incommunicado: The Failed Promise of Language Access in Immigration Detention* 8–10 (2024), <https://cardozo.yu.edu/sites/default/files/2024-08/YU-101%20Held%20Incommunicado.pdf>.

Restrictions on Outside Communication.

Noncitizens held in immigration detention are often unable to communicate with family and friends outside of the facility. These individuals often provide valuable and even necessary assistance to detainees' efforts to assert their rights by, for example, providing evidence, and gathering facts and documents. They can also identify legal counsel and facilitate legal representation. Because detainees are often transferred far from their communities, visitation may not be an option. And even when visitation is an option, non-lawyer visitation hours at immigration detention facilities for friends and family are typically much more restrictive than visitation hours for attorneys.³⁹

Frequent Transfers. Many noncitizens in ICE custody are held at multiple facilities during their detention, and transfers across district and state lines are fairly common. In fact, detainee transfers between facilities within the United States have increased significantly in the last year; ICE-contracted domestic transfer flights rose 58% from August 2025 to August 2026.⁴⁰ Transfers can represent a significant headache for immigration lawyers and their detained

³⁹ *See, e.g.*, U.S. Immigration & Customs Enforcement, Elizabeth Contract Detention Facility, Friends and Family Visits, <https://www.ice.gov/detain/detention-facilities/elizabeth-contract-detention-facility>.

⁴⁰ Human Rights First, ICE Flight Monitor: August 2026 Report 4, <https://cdn.sanity.io/files/1e7vpawz/production/996bfbd458f3f6431c2802c1c4db409947c309cc.pdf>.

clients in immigration court proceedings.⁴¹ But they can outright prevent a detainee’s lawyer from filing a habeas petition. A detainee must file a habeas petition in the district where the detention facility is located, which may be in state where their attorney is not admitted and where local counsel must be retained to obtain admission *pro hac vice*. In addition to cutting off access to an attorney that is capable of seeking habeas relief, transfers can also impede detainees’ efforts to advocate for themselves, by distancing them from friends and family who may be able to assist them in filing a petition.

Procedural Pitfalls. Habeas cases can often pose significant procedural complications for those in immigrant detention, to which pro se litigants are particularly vulnerable. To take one example, detainees in New York have been able to seek relief through “next friend” petitions, typically filed by a close friend or family member in the detainee’s name.⁴² Courts in other circuits are more restrictive of next friend petitions; for example, in the Third Circuit, the next friend must be, or be represented by, an attorney.⁴³ Transfers compound these problems. Amici are also aware of cases in which a family member filed a next friend petition in New York but,

⁴¹ Emma Jansen, *How ICE Hides Detainees From Their Lawyers*, American Prospect (Oct. 6, 2005).

⁴² *See, e.g., Ndoye v. Joyce*, No. 25-CV-8856 (VSB), 2026 WL 306387, at *1 (S.D.N.Y. Feb. 5, 2026).

⁴³ *Bah v. Tsoukaris*, No. CV 25-16925 (JXN), 2025 WL 3041812, at *2 (D.N.J. Oct. 31, 2025) (citing *Schlemmer v. Cent. Intelligence Agency*, 804 F. App’x 127, 128, n.2 (3d Cir. May 13, 2020)).

unbeknownst to the family member, the petitioner had been relocated to a facility in another state by the time of filing.

Moreover, an unsuccessful pro se habeas petition may limit a detainee's ability to bring a meritorious petition in the event that the detainee later obtains counsel. While statutory restrictions on successive prisoner petitions do not apply in actions challenging immigration detention, the common-law abuse-of-the-writ doctrine does, and courts have invoked it to dismiss successive petitions.⁴⁴ Indeed, the government has (unsuccessfully) raised the abuse-of-the-writ doctrine to oppose any relief in at least one case where it also conceded that, under binding circuit precedent, the petitioner was entitled to, at a minimum, challenge his detention in a bond hearing.⁴⁵

B. Amici's experience illustrates the importance of access to counsel for immigrant detainees .

Amici's experience in the past year litigating habeas cases underscores both the difficulties that immigrant detainees face in proceeding pro se and the fact that that legal representation can make the

⁴⁴ See, e.g., *Kumar v. Mullin*, No. CIV-26-1158-R, 2026 WL 2533143, at *3 (W.D. Okla. Aug. 27, 2026), *report and recommendation adopted*, 2026 WL 2694135 (W.D. Okla. Sept. 14, 2026).

⁴⁵ *Dima v. Genalo*, No. 26-CV-5258 (AMD), 2026 WL 2718520, at *4 (E.D.N.Y. Sept. 15, 2026).

difference between liberty and continued unlawful detention.

Ms. Y, who has a two-year-old U.S. citizen child, was arrested along with her partner and her sibling at her home in New Jersey by ICE agents and taken to 26 Federal Plaza. Ms. Y had originally been detained at a border crossing but was subsequently released, and thereafter applied for asylum and attended regular ICE check-ins. While she was at 26 Federal Plaza, NYLAG was able to speak with her, confirm that she wanted to file a habeas petition, and gather the necessary facts to support that petition. NYLAG promptly prepared and filed Ms. Y's petition in the United States District Court for the Southern District of New York. The district court granted the petition and Ms. Y was released and allowed to return home with her child. Ms. Y's sibling was transferred out of New York too quickly for anyone to file a petition in the Southern District of New York on their behalf. Ms. Y's sibling was unable to retain counsel to file a habeas petition and has since been deported.

Mr. G was ordered removed more than two decades ago, but was released on an OSUP because the government could not effectuate his removal. In January 2026, Mr. G, who was suffering from diabetes and kidney failure, was arrested while flying back home after a soccer tournament as part of his church. During his detention, he suffered from serious medical complications requiring emergency treatment. NYLAG agreed to represent Mr. G and filed a habeas petition for him while he was still detained in New York, and was able to secure his release.

Mr. W, like Mr. G, was ordered removed more than two decades ago and soon thereafter released on an OSUP. He complied with his OSUP for decades, but was detained in October 2025. Mr. W's daughter was able to prepare a next-friend habeas petition for filing in federal court in New York, but before the petition could be filed, Mr. W was transferred to a facility in New Jersey. When Mr. W's daughter filed the next friend petition in the District of New Jersey, the district court dismissed the petition in light of Third Circuit authority prohibiting litigation by unrepresented next-friends. Mr. W subsequently obtained pro bono counsel in New Jersey and filed a second petition in January 2026, which went unresolved until Mr. W was released—after over six months of unnecessary detention that accomplished nothing.

As these examples illustrate, the most important factor in determining whether a detainee is able to challenge their detention and obtain appropriate relief is whether that detainee retains counsel capable of filing a habeas petition in the district in which they are confined.

C. Data maintained by the federal judiciary underscores the importance of access to counsel for noncitizens in immigration detention

Available data confirms what amici know from experience: legal representation is essential for noncitizens who are unlawfully detained. Counseled immigration habeas petitioners are more successful, and their cases are resolved more quickly, than their pro se counterparts. Moreover, for many detainees,

access to counsel makes the difference between filing a habeas petition challenging unlawful detention and not asserting their rights at all.

Immigration detainees that manage to retain habeas counsel have achieved unprecedented levels of success, especially for litigation against the government. Case data compiled by the Federal Judicial Center in its Integrated Data Base (IDB)⁴⁶ reflects that among immigration habeas petitions—i.e., civil actions filed under nature of suit code 463 (“Habeas Corpus - Alien Detainee”)⁴⁷—filed between

⁴⁶ See Federal Judicial Center, Integrated Database (IDB), <https://www.fjc.gov/research/idb>. According to the FJC,

The IDB contains data on civil case and criminal defendant filings and terminations in the district courts, along with bankruptcy court and appellate court case information from 1970 to the present. The FJC receives regular updates of the case-related data that are routinely reported by the courts to the AOUSC. The FJC then post-processes the data, consistent with the policies of the Judicial Conference of the United States governing access to these data, into a unified longitudinal database, the IDB.

Id. These datasets are updated twice a year; the most recent update at the date of this brief includes filings and terminations through March 31, 2026. Except where otherwise noted, case statistics in this section of the brief are drawn from the “Civil cases filed, terminated, and pending from SY 1988 to present” dataset.

⁴⁷ The nature of suit code corresponds to the NOS field in the dataset.

October 1, 2025 and March 31, 2026,⁴⁸ in which the petitioner is represented by counsel,⁴⁹ 6,594 terminated in a judgment for the petitioner and 537 terminated in a judgment for the respondent—a ratio of more than twelve to one.⁵⁰ This success rate represents a significant departure from the historical baseline. Immigration habeas petitions filed by petitioners with counsel between January 1, 2017 and December 31, 2024 resulted in 248 judgments in favor of the petitioner and 589 judgments in favor of the government—a ratio of better than a two-to-one ratio.

Counseled immigration habeas petitioners have also achieved success remarkably quickly. Over half of all counseled petitions filed in February 2026, and over 70% of those filed in January 2026, were closed by the end of March. Many petitions are resolved in a few weeks, and some in just days.

Perhaps most significantly, the vast majority of petitioners who have challenged their detention through habeas proceedings have done so with the

⁴⁸ The date an action was initiated in a district court, typically by the filing of a complaint or petition, is reflected in the FILEDATE field.

⁴⁹ Cases in which petitioner is represented by counsel have the “PROSE” field set to 0 (“no Pro Se plaintiffs or defendants”) or 2 (“one or more Pro Se defendants, but no Pro Se plaintiffs”). Cases in which petitioner is pro se have the “PROSE” field set to 1 (“one or more Pro Se plaintiffs, but no Pro Se defendants”) or 3 (“one or more Pro Se plaintiffs, and one or more Pro Se plaintiffs”).

⁵⁰ A judgment for petitioner corresponds with a value of 1 (“plaintiff”) in JUDGMENT field; a judgment for the respondent corresponds with a value of 2 (“defendant”) in JUDGMENT field.

help of counsel. Pro se petitioners account for less than one-fifth of all immigration habeas cases filed between October 2025 and March 2026.⁵¹ In the months immediately after the spike in detentions, this share was even lower—around 11 percent for cases filed between October 2025 and January 2026.⁵²

Noncitizens in immigration detention who have managed to file a habeas petition pro se fared very well during the same period—though not nearly as well as their represented counterparts—winning (565 judgments for pro se petitioners) about three times as much as they lost (189 judgments for respondents).⁵³ But this is cause for concern rather than celebration, as it undercuts any suggestion that lawyers have found all of the detainees with strong claims. To the contrary, it indicates that the demand for representation from detainees with meritorious habeas claims exceeds what the bar has been able to supply. In short, the doors of the federal courthouse are open to unrepresented noncitizens in ICE custody, but the shortage of attorneys willing and able to

⁵¹ In calculating the percentage of cases filed by pro se litigants, the ORIGIN field is restricted to 1 (“original proceeding”) and 2 (“removed [from state court]”), to avoid double counting cases that may have multiple entries due to transfers, reopenings, and appellate remands. In total, 24,059 immigration habeas petitions were filed by counseled petitioners, and 5,760 by pro se petitioners.

⁵² Between October 2025 and January 2026, 11,685 immigration habeas petitions were filed by counseled petitioners, and 1,476 by pro se petitioners.

⁵³ Their cases, however, took markedly longer to resolve. Less than half of pro se petitions filed in January 2026 were resolved by the end of March.

represent them and the unique and challenging obstacles to self-representation that they face prevent many from ever reaching those doors.

The infrequency with which immigration detainees seek to assert their own rights court stands in stark contrast with other populations in government custody. Pro se prisoners filed over 90% of prisoner civil actions⁵⁴ commenced in federal court in March 2026. Many district courts maintain a staff of pro se law clerks specifically to assist judges in handling these cases. And Congress, motivated by a perception that prisoner litigation imposes significant burdens on federal courts, has enacted statutes designed to limit prisoners' ability to challenge the fact or condition of their confinement.⁵⁵

Unrepresented prisoners are, in aggregate, able to react much more quickly than unrepresented immigrant detainees to changes in the legal environment. This Court's decisions in *Johnson v. United States*,⁵⁶ invalidating the residual clause of the Armed Career Criminal Act,⁵⁷ and *Welch v.*

⁵⁴ Prisoner civil actions correspond to the following values in the NOS (nature of suit) field: 510 ("Prisoner Petitions - Vacate Sentence"), 530 ("Prisoner Petitions - Habeas Corpus"), 535 ("Habeas Corpus - Death Penalty"), 540 ("Prisoner Petitions - Mandamus and Other"), 550 ("Prisoner - Civil Rights"), and 555 ("Prisoner - Prison Condition)."

⁵⁵ See Prison Litigation Reform Act (PLRA), Pub. L. 104–134; Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132.

⁵⁶ 576 U.S. 591 (2015).

⁵⁷ 18 U.S.C. § 924(e)(2)(B).

United States,⁵⁸ which made *Johnson* retroactively applicable on collateral review, opened the door to many federal prisoners convicted under the ACCA or similar provisions in other statutes to challenge those convictions. Many of them did so pro se, including Gregory Welch, who filed a pro se petition for certiorari in which he argued that, after *Johnson*, his Florida strong-arm robbery conviction was no longer a violent felony and expressly raised the retroactivity question this Court answered in *Welch*.⁵⁹ Prisoners who had already challenged their conviction or sentence once had to obtain permission from the Court of Appeals encompassing the district where they were sentenced in order to file a second or successive § 2255 motion in the district court.⁶⁰ In the year after this court decided *Johnson*, prisoners filed over 5,800 applications for permission to file a second or successive § 2255 motion, about 60% of which were filed pro se.⁶¹ The comparison between pro se

⁵⁸ 578 U.S. 120 (2016).

⁵⁹ See 578 U.S. at 126–27.

⁶⁰ See 28 U.S.C. §§ 2244(a), 2255(h).

⁶¹ Motions under § 2244(a) are reflected in the “Appellate cases filed, terminated, and pending from FY 2008 to present” dataset. To identify such motions filed during the one-year period after this Court’s *Johnson* decision, the DKTDAT field was restricted to values between June 26, 2015 and June 27, 2016, and the ORGPROC (“Nature of the original proceeding”) field set to 5 (“2nd or successive filing of habeas corpus”). To distinguish between § 2244 motions filed by federal prisoners with those filed by state prisoners, the APPELLEE field was restricted to strings that suggest a federal government party (e.g., “UNITED STATES”). Cases from the Fifth and Eleventh Circuit are excluded because § 2244 motions in those circuits were generally coded without identifying an “appellee.”

prisoners and pro se immigration habeas petitioners underscores how ill-equipped noncitizens in immigration detention are to assert their rights in court, and thus why access to counsel is so important for them.

By promising fees to a prevailing party when the government's position lacks substantial justification, EAJA helps ensure that lawyers are incentivized to represent petitioners with strong claims that they have been wrongfully detained. EAJA is all the more essential when the government has actively chosen in a broad category of cases to litigate right up to, and sometimes past, the line of frivolity, as it has done in opposing countless immigration habeas petitions around the country. *See supra* § I.

III. EAJA is vital in ensuring that courts can efficiently handle the increase in habeas petitions that the Government's Policies have Provoked.

EAJA plays an important role in ensuring that individuals with a legitimate grievance against the government have their day in court. It also helps, through a number of mechanisms, ensure that the courts can efficiently deal with the habeas petitions that the government's detention policies have necessitated.

First, by promoting access to counsel, EAJA ensures that courts can focus on their role as decisionmakers in our adversary system of adjudication. Pro se litigation can put judges in an awkward position, especially when the litigant's claims are meritorious. This Court has repeatedly instructed that pro se filings must be "liberally

construed,” and that “a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.”⁶² At the same time, courts often insist that “pro se parties follow the same rules of procedure that govern other litigants” and emphasize that judges “cannot take on the responsibility of serving as the litigant’s attorney in constructing arguments and searching the record.”⁶³ Counsel can better identify and explain the relevant facts and law in court filings. Thus, when petitioners are represented by counsel, courts can rely on counsel to “frame the issues for decision,” and focus on their core role in our adversary system of serving “as ‘neutral arbiter[s] of matters the parties present.’”⁶⁴

Second, access to legal representation also helps ensure that the claims a petitioner presents to the courts are actually colorable.⁶⁵ Because immigration law is so complicated, pro se petitioners often misapprehend the basis for their detention and, consequently, rely on statutory provisions and authority that does not apply to their

⁶² *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

⁶³ *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (internal quotation marks omitted).

⁶⁴ *See Clark v. Sweeney*, 607 U.S. 7, 8 (2025) (quoting *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020)).

⁶⁵ *See* Fred Zacharias, *Lawyers As Gatekeepers*, 41 San Diego L. Rev. 1387, 1395 (2004) (“Courts expect lawyers to cull the arguments clients wish them to pursue, in deference to the need for judicial efficiency in responding to the arguments.”).

circumstances.⁶⁶ Attorneys have independent obligations to courts to make only assertions of fact and legal arguments that have a good-faith basis.⁶⁷

Third, counsel can also serve judicial efficiency by advising a client not to bring a meritless claim, and not to bring prematurely a claim (such as a *Zadvydas* claim) which could turn on the duration of the client's detention.⁶⁸ Over the last year, district courts have also dismissed many pro se petitions—and sometimes multiple petitions from the same petitioner—raising *Zadvydas* claims before expiration of the six-month period of presumptive reasonableness.⁶⁹ The immigration bar performs a screening function by declining to pursue claims that are frivolous or

⁶⁶ See, e.g., *Kuprashvili v. MDC Brooklyn*, No. 26-CV-02581 (NRM), 2026 WL 1662197, at *1 (E.D.N.Y. June 9, 2026) (denying motion for reconsideration of dismissal of second habeas petition, where petitioner argued for the third time that his detention was governed by 8 U.S.C. § 1226, even though he had a final order of removal).

⁶⁷ See Fed. R. Civ. P. 11.

⁶⁸ See *Haidari v. Scott*, No. 2:26-CV-01146-TL, 2026 WL 1194634, at *1 (W.D. Wash. May 1, 2026) (observing in order granting second petition that “Petitioner was proceeding pro se with his first petition,” and [h]ad he had counsel, he undoubtedly would have been advised to wait a month or two”).

⁶⁹ *Martinez-Gonzalez v. Warden, Alligator Alcatraz*, No. 2:26-CV-1730-KCD-NPM, 2026 WL 1558911, at *2 (M.D. Fla. June 2, 2026) (denying second petition without prejudice to refiling “should his current detention exceed the six-month mark, and he can demonstrate there is no significant likelihood of removal in the reasonably foreseeable future”); *Rivero Gonzalez v. Warden, Fla. Soft Side S.*, No. 2:26-CV-1701-KCD-KRH, 2026 WL 1512341, at *2 (M.D. Fla. May 29, 2026) (same).

nonviable.⁷⁰ EAJA creates an economic incentive structure that enhances this screening function.⁷¹

District court judges understand the role that counsel plays in ensuring that courts function in an orderly and efficient manner, particularly where outside circumstances have resulted in an unexpected increase in the judicial workload. Over the last year, judges across the country have appointed counsel to countless immigration habeas petitioners.⁷² EAJA plays an indispensable role in making access to legal representation a reality for immigrant detainees, and thus helps ensure that district courts are able to efficiently decide the influx of habeas petitions that the government has caused.

⁷⁰ Zacharias, *supra* n.65, at 1394–95.

⁷¹ See Jonah Gelbach & David Marcus, *A Study of Social Security Litigation in the Federal Courts* 55 (July 8, 2016), <https://www.acus.gov/sites/default/files/documents/2016.07.28%20Report%20-%20A%20Study%20of%20Social%20Security%20Litigation%20in%20the%20Federal%20Courts.pdf> (observing that, in Social Security appeals, “attorney incentives” created by EAJA “should ensure a strong set of appeals to the federal courts, a situation that explains a robust remand rate” of around 50%).

⁷² See, e.g., *A.M.H. v. Warden, Stewart Det. Ctr.*, No. 4:25-CV-483-CDL-AGH, 2026 WL 1898963, at *1 (M.D. Ga. June 11, 2026), *report and recommendation adopted*, 2026 WL 1897114 (July 1, 2026); *Rodas Diaz v. Warden of the Cal. City Det. Ctr.*, No. 1:26-CV-3021 DJC CSK, 2026 WL 1864515, at *1 (E.D. Cal. June 29, 2026); *Kozlova v. Warden of the Cal. City Det. Ctr.*, No. 1:26-CV-0499 DJC AC, 2026 WL 1785250, at *1–2 (E.D. Cal. June 22, 2026).

CONCLUSION

This Court should reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

MICHELLE PALLAK

Counsel of Record

DESIREE GRACE

SCOTT WEINGART

MCCARTER & ENGLISH, LLP

Four Gateway Center

100 Mulberry Street

Newark, NJ 07102

(973) 849-4034

mpallak@mccarter.com

Attorneys for Amici Curiae

September 23, 2026