

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DAVID JENNINGS, et al.)
Petitioners,)
v.) No. 15-1204
ALEJANDRO RODRIGUEZ, et al.,)
Individually and on Behalf of All)
Others Similarly Situated,)
Respondents.)
- - - - -

Pages: 1 through 69

Place: Washington, D.C.

Date: October 3, 2017

HERITAGE REPORTING CORPORATION

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12 Washington, D.C.

13 Tuesday, October 3, 2017

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15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States
17 at 11:05 a.m.

18

19 APPEARANCES:

20 MALCOLM L. STEWART, Deputy Solicitor General,

21 Department of Justice, Washington, D.C.; on behalf
22 of the Petitioners.

23 AHILAN T. ARULANANTHAM, Los Angeles, California; on
24 behalf of the Respondents.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 15-1204, Jennings versus
5 Rodriguez.

6 Mr. Stewart.

7 ORAL ARGUMENT OF MALCOLM L. STEWART
8 ON BEHALF OF THE PETITIONERS

9 MR. STEWART: Mr. Chief Justice, and
10 may it please the Court:

11 This Court has often stressed the
12 breadth of Congress's constitutional authority
13 to establish the rules under which aliens will
14 be allowed to enter and remain in the United
15 States.

16 This case squarely implicates that
17 principle. During the pendency of Respondents'
18 removal proceedings, the question whether
19 members of a certified class will be detained
20 and the question whether they will be allowed
21 into the United States are simply two sides of
22 the same coin.

23 In practical effect, Respondents
24 assert a constitutional right to be released
25 into this country for the remainder of their

1 removal proceedings if those proceedings last
2 for more than six months and the government
3 cannot prove flight risk or dangerousness by
4 clear and convincing evidence.

5 This Court's decisions make clear that
6 Respondents have no such right. If I may, I'd
7 like to begin with the arriving alien subclass.
8 The statutory provision that's most directly at
9 issue for these purposes is at page 152a of the
10 petition appendix.

11 And this one deals particularly with
12 what -- what I think is the most important
13 subset of the arriving alien subclass; that is,
14 individuals who come to the country for the
15 first time, they pass a credible fear screening
16 for asylum purposes, and they're then placed in
17 removal proceedings.

18 And near the top of page 152a, in
19 Romanette II, referral of certain aliens, it
20 says if the asylum officer determines at the
21 time of the interview that the alien has a
22 credible fear of persecution, the alien shall
23 be detained for further consideration of the
24 application for asylum.

25 And so, in the very provision in which

1 Congress was dealing with aliens who passed the
2 credible fear screening, it was making clear
3 that the finding of a credible fear confers no
4 entitlement to be released into the United
5 States. It's an important step in the process
6 because it means that the alien won't be placed
7 in expedited removal and have -- will have a
8 thorough chance to -- to prove his compliance
9 with the prerequisites for asylum, but it
10 doesn't confer any right to be released into
11 the United States. To the con --

12 JUSTICE GINSBURG: There is -- there
13 is a possibility of parole, is it?

14 MR. STEWART: There is a possibility
15 of parole. That's entrusted to the discretion
16 of DHS. That's made under some of the same
17 criteria that the Respondents would have the
18 immigration judge make in bond hearings. That
19 is, it's the policy of DHS that if an alien
20 passes a credible fear screening, and DHS is
21 adequate -- is able adequately to verify his
22 identity, is satisfied that the alien is not a
23 flight risk and will not be dangerous if
24 released into the community. Unless there's
25 some countervailing consideration, the policy

1 of DHS is to parole those individuals into the
2 country. I think --

3 JUSTICE KENNEDY: Can you give me any
4 idea of numbers? Do 10 percent meet that
5 requirement, 20 percent, or do we know?

6 MR. STEWART: We really don't know.
7 DHS doesn't keep statistics as to -- to the
8 numbers. I don't think it's a -- it's not
9 either a formality in the sense of aliens being
10 always or almost always paroled; neither is it
11 a nullity. But between those two extremes, I
12 don't think we really have reliable statistical
13 evidence. I think there was --

14 JUSTICE SOTOMAYOR: I -- I thought
15 that we had some. And from what I understand,
16 in 2012, ICE granted parole to 80 percent of
17 arriving aliens. In 2015, the number dropped
18 to 47 percent. And it may be lower now.

19 So my question is it's obviously the
20 executive alone making this determination; what
21 other area of law have we permitted a
22 government agent on his or her own, without a
23 neutral party looking at that decision, to
24 detain someone indefinitely?

25 MR. STEWART: Well, I -- first of all,

1 I would not accept the premise that this is
2 indefinite detention. It's true that there is
3 no outer limit in terms of a number of days,
4 but it is detention that is specifically
5 pending a determination of eligibility for --
6 for asylum.

7 JUSTICE SOTOMAYOR: Well, but that --
8 that assumes that that determination is going
9 to be done in some expeditious way, but we know
10 as a matter of fact that these determinations
11 can sometimes take years.

12 MR. STEWART: They can sometimes take
13 a long time. The -- the cases in which aliens
14 are detained are expedited by the immigration
15 judges and by the BIA. So they do move more
16 quickly than cases involving non-detained
17 aliens.

18 I guess the first thing I would say in
19 response to your question, is there any other
20 area of law, the Court has said time after time
21 that insofar as people arriving -- aliens
22 arriving at our shores are concerned, whatever
23 process Congress chooses to give is due
24 process. Aliens, once they've built up ties to
25 the country --

1 JUSTICE SOTOMAYOR: Well, but the --
2 the problem with that is that that's
3 lawlessness. That's basically saying that
4 we're not a country of law, that we're a
5 country of arbitrariness in detaining people,
6 locking them up.

7 Perhaps let's -- let's -- answer this
8 question: In which ways is immigration
9 detention different than criminal detention? I
10 mean, I -- I understand right now that when you
11 detain aliens, you put them in orange suits,
12 they are shackled during visitation and court
13 visits, they are subject to surveillance and
14 strip searches, they are referred to by number,
15 not by name.

16 So in which ways is immigration
17 detention different than criminal detention?

18 MR. STEWART: Well, I think the -- the
19 real difference is the justification for the
20 detention. That is, the justification for
21 criminal detention, at least with respect to
22 convicted prisoners, obviously, is that they've
23 found -- been found guilty of a crime, and for
24 that, you need judicial process.

25 There -- there are some circumstances

1 outside this country where aliens who want to
2 apply for a visa, for instance, or who want to
3 assert an entitlement to refugee status can do
4 so outside this country. And where those
5 avenues are available, during the period while
6 U.S. Government officials are deciding whether
7 to grant the request, the alien doesn't need to
8 be detained. But when the alien arrives at the
9 shores of the United States, the only two
10 options are detention and release into the
11 community.

12 And so the principle that the alien
13 has no constitutional right to be released into
14 the community necessarily compels detention.

15 Now, the other respect in which --

16 JUSTICE GINSBURG: Mr. Stewart, there
17 are -- there is something in between. It
18 doesn't have to be release, you are fancy free.
19 You can -- they can monitor. They can use
20 monitoring devices to check on the person who's
21 been released.

22 MR. STEWART: There are various forms
23 of monitoring and supervision that the
24 government can use. I think it's still
25 basically release even though it's release upon

1 I mean, the word "detain" doesn't say that. It
2 just doesn't say.

3 MR. STEWART: Well, Sections 1225 and
4 1226 have traditionally been understood to get
5 at different categories of aliens. 1226 is the
6 provision that we use when we arrest somebody
7 who is within the -- who has entered the United
8 States -- or is within the United States; 1225
9 is the one we use when we are dealing with
10 aliens who arrive at our shores.

11 Now, there is a tweak to that
12 principle. And you alluded to the category of
13 aliens who are within 100 miles of the border
14 and have been in the country for fewer than 14
15 days. For most purposes, those are treated as
16 though they were people who just arrived. The
17 BIA has issued the decision in Matter of X-K-
18 that -- you know, you can agree with it or
19 disagree with it, but it says for purposes of
20 the bond hearings, we read the regulations to
21 say they have -- they should be treated for
22 bond hearings as though they had been arrested
23 in the interior.

24 JUSTICE BREYER: They are just as much
25 the people you mentioned at the beginning,

1 those are just as much people who have no right
2 to be in the country, just as much people who
3 haven't been here for more than a few hours,
4 just as much. And yet the agency itself thinks
5 there's no problem with giving them bail
6 hearings.

7 MR. STEWART: The BIA has never
8 suggested that aliens who come to the border
9 and are detained at a checkpoint are entitled
10 to what the aliens are given in -- under Matter
11 of X-K-. And I don't think there's any
12 justification for bootstrapping that ruling.

13 JUSTICE KAGAN: But the BIA made that
14 distinction because it thought that the
15 regulation prevented other aliens coming to the
16 border from receiving bail hearings. But it
17 read the statute as not imposing such an
18 obstacle.

19 MR. STEWART: The -- the statute says
20 with respect to the -- the arriving aliens that
21 these people shall be -- shall be detained for
22 further consideration --

23 JUSTICE KAGAN: Yes, and what I'm
24 saying is the BIA read the statute in exactly
25 the way Justice Breyer indicated. So are you

1 saying that the BIA was simply wrong in X-K-?
2 Because X-K- said the statute doesn't say, the
3 statute is perfectly consistent with bond
4 hearings being given; it's only this
5 regulation, and the regulation only applies at
6 the border.

7 MR. STEWART: Well, even if you adopt
8 that reading of the statute and even if you
9 accept the decision in X-K- to -- to that
10 extent, the authority under 1226, which is at
11 page 156a of the petition appendix, this deals
12 with people who are detained within the
13 country. And it says, except as provided in
14 subsection (c) of this section, which deals
15 with criminal aliens, and pending the
16 decision -- such decision, namely the decision
17 whether the alien should be removed from the
18 United States, the Attorney General may
19 continue to detain the arrested alien or may
20 release the arrested alien.

21 And it's the regulations that provide
22 for bond hearings for people who are arrested
23 inside the country. So -- but even if you read
24 that statute to authorize the executive branch
25 to grant bond hearings for individuals who are

1 newly arriving at the border, nothing in the
2 statute says that that's compelled and
3 certainly nothing in the Constitution says that
4 that's compelled.

5 And if I could return to it for a
6 second, to your question, Justice Sotomayor,
7 when you asked is there anything comparable in
8 other areas of the law or why would immigration
9 be unique? I think you -- you can think of the
10 -- the plenary power doctrine, the idea that
11 the political branches have plenary or nearly
12 plenary power to regulate nearly initial
13 admission as simply an idiosyncratic feature of
14 immigration law, but you could also think of it
15 as an immigration application of a more general
16 principle. That is, it's often the case that
17 the government has to provide greater process
18 when it tries to take away something that an
19 individual already has than it would have to
20 provide when it decides whether to give a
21 benefit to an individual in the first place.

22 JUSTICE SOTOMAYOR: But what -- some
23 process. Here, what you're saying, at least
24 with respect to this 1225(a), is no process.

25 MR. STEWART: Well --

1 JUSTICE SOTOMAYOR: Because you have
2 an executive, a parole IB -- INS member
3 deciding whether someone should be paroled or
4 not, and no neutral magistrate of any kind is
5 looking at that executive decision to ensure
6 it's not arbitrary. There's something
7 fundamental about that in due process, which is
8 someone should be looking at whether this is
9 neutral or not.

10 MR. STEWART: Well, somebody is. I
11 mean --

12 JUSTICE SOTOMAYOR: Some neutral
13 party.

14 MR. STEWART: Some -- but it -- it
15 could certainly be the case as far as the
16 Constitution is concerned that, in many
17 situations, a person who applies for government
18 benefits, for instance, could get the process
19 that -- that Congress specified. If Congress
20 specified that an employee of the Social
21 Security Administration would make a decision
22 as to an initial award of benefits and didn't
23 provide -- Congress has provided for judicial
24 review, but if Congress didn't provide for
25 judicial review, I think that the answer as a

1 constitutional matter would be you have no Due
2 Process Clause property interest --

3 JUSTICE KAGAN: Mr. Stewart, is -- is
4 your argument about the new admits, the people
5 who are coming to the border, premised on the
6 idea that they simply have no constitutional
7 rights at all?

8 MR. STEWART: It is premised on that.
9 Now, we do have the --

10 JUSTICE KAGAN: Okay. If it is
11 premised on that, I mean, Justice Scalia in one
12 of his opinions talked about, surely, that --
13 that can't be right; could we torture those
14 people, could we put those people into forced
15 labor? Surely, the answer to that is no. Is
16 that right?

17 MR. STEWART: Yeah, I should have been
18 more precise in saying they have no
19 constitutional rights with respect to the
20 determination whether they will be allowed to
21 enter the country.

22 JUSTICE BREYER: That's an interesting
23 --

24 JUSTICE KAGAN: Okay. So -- but they
25 do have some constitutional rights, not to be

1 tortured, not to be placed in hard labor. Why
2 isn't it -- it pretty close to that, not to be
3 placed in arbitrary confinement, arbitrary
4 detention?

5 MR. STEWART: Because when they arrive
6 -- I mean, if by "arbitrary" you meant --

7 JUSTICE KAGAN: "Arbitrary" means that
8 nobody gave them an individualized hearing, and
9 so we don't know whether they're being held for
10 any good reason. Nobody's made that decision.
11 So, usually, in our -- you know, usually, in
12 our constitutional law, we think that that's a
13 problem.

14 MR. STEWART: Now, I -- I think,
15 Congress, consistent with the Constitution,
16 could have abolished parole altogether and
17 could have said, as a categorical matter, no
18 newly arriving alien will be allowed to enter
19 the country until he or she has persuaded the
20 decision-maker that the right answer ultimately
21 is to let that person in.

22 I think that would be a constitutional
23 scheme under this Court's decisions, but
24 Congress has historically offered parole as a
25 form of process by -- to --

1 JUSTICE BREYER: Visitors too? I
2 mean, you know, people overstay their visitors'
3 visas. And we find a businessperson who, in
4 fact, has overstayed his visa. Oh, you're here
5 too long; we'll put you in a cell and we'll
6 keep you there for 13 months. Could they do
7 that?

8 MR. STEWART: Well, they could put him
9 in --

10 JUSTICE BREYER: Constitutionally?

11 MR. STEWART: They could -- well, they
12 could put him in a cell --

13 JUSTICE BREYER: No, I mean, the only
14 answer has to be no, doesn't it?

15 MR. STEWART: Well, the answer -- the
16 answer could be he is arrested; he has an
17 entitlement under the statute in that
18 circumstance to a bond hearing. We don't think
19 he has a consti -- a -- a --

20 JUSTICE ALITO: But doesn't he have --

21 JUSTICE BREYER: No, wait, what I'm
22 thinking of is this. You've got me thinking at
23 the beginning of somebody standing at the
24 airport outside the gate or standing at --
25 outside the gate down at, say, in Mexico, or

1 Canada, possibly. That isn't what happens.

2 What happens is they're told to that
3 person: You want to go home? Go. And he
4 says: But I have a legal right, I think, to be
5 in the United States. Very well, come in.

6 Now he's physically in the United
7 States. And what we do to the person
8 physically in the United States, because he has
9 shown that he has a credible fear of
10 persecution, is we put him in a little
11 reception area which looks an awful lot like a
12 cell. And we keep him there for 13 months,
13 possibly, or a year without a bail hearing, and
14 maybe without anything.

15 Now, that's the problem. And it seems
16 to me if I'm right -- and you'll correct me if
17 I'm wrong -- but if I'm right, it's not
18 quite -- I mean, it has a lot of implications
19 because there are a lot of people in that
20 category, and -- and to say they have no rights
21 at all or even no rights, not to be confined
22 arbitrarily, dah-dah-dah, I'm pretty nervous
23 about that.

24 MR. STEWART: Well, again, I tried to
25 be more precise with Justice Kagan. It's no

1 right -- no constitutional right to be admitted
2 into the country.

3 And when the alien simply arrives at
4 the border, the only alternative to release him
5 to the community, subject perhaps to some form
6 of supervision, is detention. And I think it's
7 also worth pointing out that with respect to
8 these class members, the people who were
9 actually detained for more than six months,
10 fewer than 5 percent ultimately prevailed on
11 the ground that they were not removable; that
12 is, to the extent that mistakes were made at
13 the border as to an actual entitlement --

14 JUSTICE BREYER: Wait, but I thought
15 40 percent eventually win, something like that.

16 MR. STEWART: A number of them win,
17 but on discretionary grounds. They obtain
18 asylum or they obtain cancellation of removal,
19 but they don't establish a legal right to be
20 there.

21 JUSTICE BREYER: Mr. Stewart --

22 JUSTICE KENNEDY: Do you agree that
23 detention violates due process, if there's an
24 unreasonable delay in that detention?

25 MR. STEWART: I would -- if the

1 unreasonable delay is attributable to the
2 government in its prosecutorial capacity.

3 JUSTICE KENNEDY: And how should the
4 Court assess that reasonableness when delays
5 result from backlogs? Let's -- let's suppose
6 that Congress has provided only one-tenth of
7 the necessary immigration judges to avoid
8 unreasonable delays. Is that attributable to
9 the government?

10 MR. STEWART: I would not attribute
11 that to the government. And I think I'd like
12 to focus on the two primary categories.

13 JUSTICE KENNEDY: So, if immigration
14 judges were not available for a year and a
15 half, that's not an unreasonable delay because
16 we just can't count that?

17 MR. STEWART: Well, with respect to
18 the arriving aliens, there still is the
19 constitutional rule that they have no due
20 process rights in connection with their initial
21 entry into the country.

22 JUSTICE KENNEDY: But we -- we -- we
23 started from the premise that you say that
24 there can -- due process is violated when
25 there's an unreasonable delay attributable to

1 the government.

2 And my question is going to be how --
3 how can we measure that?

4 MR. STEWART: Well, you're --

5 JUSTICE KENNEDY: Isn't -- isn't a
6 bright line rule, six months, nine months,
7 whatever it is, an easier way than to say,
8 well, are there enough immigration judges --
9 which there aren't -- how -- how can we -- how
10 can we measure this?

11 MR. STEWART: Well, let me say a
12 couple of things in response to that. The
13 first, in your concurring opinion in *Demore*
14 versus *Kim*, you said that detention, in that
15 case you were talking specifically about
16 criminal aliens who were detained under
17 1226(c), but you said detention might become
18 unconstitutional if the government was
19 unreasonably prolonging the detention for some
20 purpose unrelated to its original purposes;
21 namely, preventing flight risk and preventing
22 danger to the community.

23 And so, for instance, if DHS officials
24 were -- believed that the alien was going to
25 win asylum at the end of the day and wanted to

1 keep him confined for as long as possible, and
2 protracted the proceedings for that purpose,
3 that would establish -- if you could prove
4 that, that would establish a valid
5 constitutional claim under that theory.

6 The other thing I would say about the
7 various bright line rules that have been --

8 JUSTICE KAGAN: But if I could just
9 push on Justice Kennedy's question a bit, I
10 mean, for those -- that class of aliens, we are
11 talking about people who have been in this
12 country, who clearly do have various
13 constitutional rights.

14 And are you suggesting that if the
15 backlog is five years, it's okay to keep them
16 there for five years without a determination of
17 whether they pose any risk of flight or whether
18 they're dangerous?

19 MR. STEWART: I would say that is not
20 unconstitutional. And one of the -- one of the
21 points I would make is --

22 JUSTICE KENNEDY: But you have to also
23 say under your premise that it's not
24 unreasonable, because I thought you agreed that
25 detention violates due process when there's an

1 unreasonable delay.

2 MR. STEWART: I would --

3 JUSTICE KENNEDY: Now you're saying,
4 oh, well, there's no constitutional right.
5 This doesn't -- this doesn't match.

6 MR. STEWART: Well, I would say a
7 delay attributable to unreasonable action on
8 the government's part.

9 And I think with respect to the
10 criminal aliens --

11 JUSTICE KAGAN: So five years of
12 backlog or suppose that the government decided
13 to appeal from an adverse decision and that
14 that created a -- a further delay of two or
15 three years.

16 MR. STEWART: Let me give you my most
17 extreme answer, and then let me give you a -- a
18 backup answer.

19 The most extreme answer is the
20 criminal alien who is detained for more than
21 six months, unlike every other form of
22 detention that are -- is discussed in the
23 briefs, that alien always has the option of
24 terminating the detention by accepting a final
25 order of removal and returning home.

1 JUSTICE KAGAN: I take it that that's
2 your most extreme answer because it doesn't
3 sound all that good.

4 (Laughter.)

5 MR. STEWART: Well, the -- the -- but
6 the other -- the other -- no, the other nuance
7 to the most extreme answer is Congress, as
8 we've said, has provided certain bases; asylum
9 in some instances; cancellation of removal is a
10 more prevalent form of discretionary relief for
11 aliens who are convicted of criminal offenses
12 and have been confined under 1226(c), Congress
13 had no constitutional obligation to create
14 those discretionary bases on which an alien
15 can -- can try to remain in the country. And
16 so Congress --

17 JUSTICE ALITO: What if we --

18 MR. STEWART: I'm sorry.

19 JUSTICE ALITO: Go ahead.

20 MR. STEWART: Congress could have said
21 all of the aliens who fit within the categories
22 covered by 1226(c) will be removed without
23 regard to discretionary forms of relief because
24 those will be unavailable.

25 And if Congress can take that step, it

1 can also take the step of saying we will give
2 you some hope of discretionary relief, but our
3 resources are thin, and it may take a long time
4 for us to rule on your case.

5 JUSTICE ALITO: You --

6 CHIEF JUSTICE ROBERTS: It seems to me
7 I'm just -- just looking at your supplemental
8 reply brief. And you say that if the process
9 lasts longer than 14 months, it could fairly
10 prompt an occasion for review.

11 MR. STEWART: I mean, it -- it could
12 be --

13 CHIEF JUSTICE ROBERTS: -- it sounds
14 close to a concession.

15 MR. STEWART: Well, I could be wrong,
16 but I believe we were talking there about the
17 immigration judge stage of the proceedings.
18 And what we were saying was in order to decide
19 whether a case is an outlier, you should look
20 to -- to statistical evidence about how long do
21 particular stages of a case typically take.

22 And if a particular -- if there is an
23 as-applied challenge and the evidence is this
24 particular stage of the case has taken wildly
25 longer than it ordinarily does, that should

1 prompt further inquiry.

2 But if due to resource constraints or
3 whatever it became typical for proceedings in
4 1226(c) cases to take three years, I think we'd
5 endorse a different principle.

6 JUSTICE ALITO: That --

7 CHIEF JUSTICE ROBERTS: Yes, I think
8 -- I think I interrupted Justice Alito.

9 JUSTICE ALITO: Well, I was just going
10 to say if -- let's assume that there is a --
11 that it would be a constitutional violation if
12 there is unreasonable delay. What is the best
13 way to deal with it?

14 Is it for us to impose some sort of a
15 time limit, a hard time limit, or would it be
16 better to deal with it the way we deal with
17 Speedy Trial Act -- speedy trial -- not Speedy
18 Trial Act -- constitutional speedy trial claims
19 where you look at -- at all of the factors of a
20 particular case?

21 MR. STEWART: It would be much better
22 to go the -- the latter route. And I think
23 there are several differences between the case
24 -- this particular setting and the cases in
25 which the Court has adopted bright line rules,

1 but the one that I would focus on most intently
2 is I'm not aware of any situation where the
3 Court has imposed a bright line constitutional
4 deadline where the duration of particular steps
5 was so much within the control of the person
6 who is asserting the constitutional right.

7 JUSTICE SOTOMAYOR: Mr. Stewart,
8 individual consideration, like a habeas, if we
9 granted a habeas -- if we say habeas will take
10 care of this, the courts can look at it. What
11 are they going to look at?

12 I think they're going to look at
13 whether or not you've unreasonably delayed and
14 decide, well, there's a possibility, so let's
15 give this person a bond hearing.

16 The issue here is whether the
17 Constitution sensibly would say give people a
18 bond hearing after a certain amount of time,
19 because then that independent neutral
20 adjudicator can decide whether the reason the
21 alien is being held is that he's a national
22 security risk, he's committed a crime that's so
23 heinous that he shouldn't be let out because
24 he's a danger to the community, or if it's a
25 1226(a) class member who was picked up merely

1 because they were in a sweep, but there's no
2 criminal record, they have strong ties to the
3 community, they own property, they should be
4 let out.

5 Why would it be sensible to put that
6 person in an individual situation as opposed to
7 creating a rule that says after a certain
8 amount of time, government, explain why this
9 person is dangerous?

10 MR. STEWART: If the Court thinks the
11 Constitution actually imposes a six- or an
12 eight-month deadline, this case is a perfectly
13 appropriate vehicle to say it. We think that
14 the analysis of whether there is a
15 constitutional violation depends on
16 consideration of a variety of factors,
17 including the extent to which the alien was
18 responsible for the delay.

19 If I may, I'd like to reserve the
20 balance of my time.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Arulanantham.

24 ORAL ARGUMENT OF AHILAN ARULANANTHAM
25 ON BEHALF OF THE RESPONDENTS

1 MR. ARULANANTHAM: Thank you, Mr.
2 Chief Justice, and may it please the Court:

3 I think my friend's presentation
4 clarifies the basic difference between the
5 parties in this case.

6 In their view, as he says, removal and
7 a detention are just two sides of the same
8 coin. And we fundamentally disagree with that
9 provision -- position for both doctrinal and
10 practical reasons.

11 For doctrinal reasons, it goes far
12 beyond anything this Court has ever said with
13 respect to the power to detain non-citizens.
14 All the way back in Wong Wing, when the Court
15 in 1896 first said that there is a power to
16 detain, they did so in the next sentence by
17 analogizing to the pretrial criminal process.

18 You have the power to detain, but only
19 if the detention is necessary to ensure that
20 the person appears or to prevent, you know, a
21 danger to the community. Similarly, in Carlson
22 v. Landon, the height, arguably, of the
23 government's detention power, the Court said we
24 won't impute dangerousness to everybody who's
25 facing deportation proceedings. Instead --

1 JUSTICE GINSBURG: You -- you
2 mentioned -- you mentioned the pretrial
3 detainee, but there is nothing like a six-month
4 requirement. If somebody is being detained,
5 the remedy that the Ninth Circuit provided a
6 hearing every six months, that is -- is not
7 provided to pretrial detainees.

8 MR. ARULANANTHAM: Your Honor, let's
9 leave the periodic part of that aside for just
10 a moment.

11 As for the initial six-month hearing,
12 the analogy there is to the -- the bond hearing
13 that you get within days promptly, as the Court
14 said in Salerno, after your arrest in the
15 pretrial detention context. And if instead my
16 friend's position is correct, Your Honor, that
17 just the fact that you're in deportation
18 proceedings itself is sufficient to justify
19 your detention, then Congress could pass a law
20 that mandated the detention of every person in
21 removal proceedings.

22 And, in fact, my friend said that with
23 respect to, you know, people arriving at the
24 border.

25 JUSTICE KAGAN: Well, we -- we know

1 that Demore said that this was permissible as
2 long as it was for a matter of months. Isn't
3 that true?

4 MR. ARULANANTHAM: Yes, two things,
5 Your Honor, that it was a brief, and also that
6 the-- the detainee had conceded their
7 deportability.

8 And I think both are extremely
9 important here. Obviously the detention times
10 here are something like either eight or 10
11 times, depending on who you talk to, more than
12 those in Demore, but, in addition, our class
13 members are detained for a long time because
14 they are pursuing defenses to their cases.

15 And many of them, 40 percent for
16 the -- almost 40 percent for the Mandatory
17 Subclass, two-thirds for the Arrivings, won
18 their cases even when they were detained, you
19 know, and I expect that number to go up.

20 JUSTICE KAGAN: So I agree that
21 there's a significant difference about the
22 time. I guess I'm less sure whether there's a
23 difference as to that second factor because
24 it's -- I think many of your clients are
25 pursuing cancellation of removal, which I

1 believe was the same as in Demore; is that not
2 correct?

3 MR. ARULANANTHAM: No, it is not, Your
4 Honor. This is an important point. So the
5 only relief, as the Court understood the claim
6 in Demore, which was not actually what was true
7 of Mr. Kim, but as the Court decided the case,
8 the only claim he was -- relief he was seeking
9 was withholding of removal.

10 And withholding of removal does not
11 give you a right to remain in the United
12 States. You lose your green card and can be
13 deported to any country, except for one, you
14 know, unless conditions change in that country.
15 It's a form of weaker kind of asylum
16 protection.

17 In contrast, cancellation of removal,
18 which is half the Mandatory Subclass is
19 eligible for that, if you win that, you keep
20 your green card. You're never ordered removed.
21 And the same is true for adjustment of status,
22 is also true for asylum, for the Arriving
23 Subclass. So there's a fundamental difference
24 here. Those people get a path to citizenship,
25 actually, you know, through that case.

1 And the reason why that matters so
2 much is because the Court treated the
3 concession of deportability as like a proxy for
4 flight risk in Demore and accepted that as a
5 proxy, a categorical generalization because the
6 detention was brief, right?

7 JUSTICE GORSUCH: Counsel, can you
8 help me --

9 MR. ARULANANTHAM: But that is a poor
10 proxy for our -- excuse me, Your Honor. Excuse
11 me.

12 JUSTICE GORSUCH: You know what, I'm
13 sorry. I'm way over here. I was hoping you
14 could help me with a couple of jurisdictional
15 tangles I'm snarled up in.

16 One is 1252(b)(9), which as you'll
17 recall, indicates Congress's intent to strip
18 courts of jurisdiction over final orders of
19 removal, attack -- collateral attacks on them.
20 What do we do about that, in your view?

21 And then also (f)(1), which the Ninth
22 Circuit worked around by saying, in part, it
23 was interpreting the statute, not restraining
24 the statute. But if we go down constitutional
25 grounds, we would be restraining the statute --

1 MR. ARULANANTHAM: Yes.

2 JUSTICE GORSUCH: -- at least through
3 a declaratory judgment, which, of course, the
4 government -- we would expect them to abide it
5 much like an injunction. So how do -- how do
6 we handle those two problems?

7 MR. ARULANANTHAM: Yes, Your Honor.

8 JUSTICE GORSUCH: I'd like the
9 government's view on that too.

10 MR. ARULANANTHAM: Yes, Your Honor,
11 (b) (9) unfortunately is not briefed, but the
12 government has said repeatedly that it doesn't
13 apply to detention claims. And that makes
14 sense because the only time you can challenge
15 it is in a petition for review of your final
16 removal order, which in this case is after all
17 the detention has already happened. So --

18 JUSTICE GORSUCH: Right.

19 MR. ARULANANTHAM: -- so they've read
20 the statute, as have we, to not bar detention
21 claims.

22 JUSTICE GORSUCH: And --

23 MR. ARULANANTHAM: As to (f), Your
24 Honor, also unfortunately not briefed and I
25 think waived insofar as the Ninth Circuit ruled

1 when at the time that the Ninth Circuit --

2 JUSTICE GORSUCH: Can it be waived?
3 That would be an initial question I guess I'd
4 have.

5 MR. ARULANANTHAM: Yes, I think it can
6 be waived, Your Honor. It doesn't -- it just
7 goes to the remedial power. It doesn't go to
8 subject matter jurisdiction.

9 JUSTICE GORSUCH: Okay.

10 MR. ARULANANTHAM: And the -- the
11 Ninth Circuit ruled -- recognized that there
12 was a constitutional claim in the case at the
13 time it issued its class certification order.
14 The government argued (f) at that time, and
15 never sought certiorari, but if Your Honor also
16 has concerns about it I would say, you know, it
17 says the Supreme Court has the power.

18 JUSTICE GORSUCH: Right.

19 MR. ARULANANTHAM: Because it exempts
20 the Supreme Court, and, you know, we're here
21 now. It's a habeas petition.

22 JUSTICE GORSUCH: Right.

23 MR. ARULANANTHAM: And it also doesn't
24 mention habeas at all, which was the basis for
25 the Court's jurisdictional ruling in Demore

1 v. Kim. And since then actually Congress
2 amended the Real ID Act and they put explicit
3 mentions to habeas in other provisions of 1252,
4 but they didn't do it in (f), so I think
5 there's a, you know, a reasonable statutory
6 argument --

7 JUSTICE GORSUCH: Thank you.

8 MR. ARULANANTHAM: -- to that, Your
9 Honor.

10 You know, going back, though, to Your
11 Honor's question, Justice Kagan, you know, they
12 viewed deportability, the concession, as a
13 proxy for flight risk. And what we know now,
14 at least as to our group of people who have
15 substantial defenses, is it is a horrible proxy
16 for flight risk.

17 And, you know, we have people in our
18 case who have citizenship claims -- excuse me,
19 have married U.S. citizens, and they have a
20 petition. And they're going to win their case.
21 They're just waiting for the DHS to decide the
22 petition. And they get detained like eight
23 months, 10 months waiting for this petition to
24 get decided. That person has no reason to
25 flee.

1 We also have alternatives to detention
2 now, intensive supervision, gets extremely,
3 extraordinarily high appearance rates by the
4 government's own witness testimony, and so the
5 idea that the immigration judge can't just look
6 at that to individually assess whether or not
7 you actually do present a flight risk, it seems
8 like the due process clause should require that
9 here, even if it didn't require it in Demore.

10 JUSTICE KAGAN: You know, thinking
11 about Demore again on just the timing issue,
12 Demore makes a big point of saying how short
13 the times are here and most of them are 90
14 days. And even at the top end, it's only five
15 months. But Mr. Demore himself was six months.

16 So I guess my question is does that
17 mean that your proposed remedy, which is a
18 six-month line, just doesn't fit with Demore,
19 given that we sent Demore back and he was -- he
20 continued to be detained?

21 MR. ARULANANTHAM: Your Honor, I think
22 the Court decides, the opinions should be read
23 to decide the claims that are argued. And Mr.
24 Kim never argued that my detention is, I
25 concede, fine, for the first six months, it

1 only became unconstitutional after that time
2 period.

3 He never made the argument that, for
4 example, there's a long history, even in the
5 criminal context, with respect to petty
6 offenses versus, you know, serious ones. Six
7 months is treated as a really significant
8 limitation because of the jury trial right.

9 He didn't argue that Zadvydas
10 required, you know, because Congress previously
11 doubted the constitutionality of detention
12 beyond six months, that that was the relevant
13 line. So I don't think Demore controls the
14 question. I think it is open.

15 And I think, you know, I think I've
16 sort of given you some of the reasons why I
17 think six months is a logical rule. You know,
18 this Court has never authorized detention
19 without a hearing before a neutral
20 decision-maker, outside of national security,
21 beyond six months. So I think it would be
22 extraordinary to do that.

23 Demore certainly didn't say that.
24 Demore said the vast -- the outlier cases for
25 the tiny percent involving appeals will be four

1 and a half months, and most of them are 47
2 days. And the Court didn't understand I think
3 what the Court here obviously does now about
4 backlogs and about also the way the immigration
5 process is structured.

6 So, if you want to apply for
7 cancellation of removal, for example, you have
8 to take what they call a continuance. If my
9 lawyer --

10 JUSTICE GINSBURG: Would you -- would
11 you clarify the relief that you're seeking now?
12 I don't know of any regime, maybe there is one,
13 where someone who is being detained has to be
14 brought before a judge every six months.

15 Is it, as you pointed out, with the
16 pretrial detainees, there's an immediate bail
17 hearing. But is there any --

18 MR. ARULANANTHAM: Yes, Your Honor.

19 JUSTICE GINSBURG: Yes?

20 MR. ARULANANTHAM: Yes, Your Honor.

21 The agency's own regulations governing Zadvydas
22 detainees, people who have lost the right to
23 live here, there's -- there's two of them,
24 241.4 and 241.14. The second one provides for
25 IG bond hearings every six months for people

1 who are especially dangerous. So they're
2 detaining them, notwithstanding Zadvydas,
3 because they are a national security threat or
4 sex offenders, and there's a couple of other
5 provisions there.

6 241.4 provides it every year. And
7 there are other civil commitment schemes that
8 do it every year. It's true that six months is
9 rare, although the agency does do it in this,
10 you know, in this other context.

11 Our main concern, Your Honor, is that
12 this is a group of unrepresented people. So --

13 JUSTICE ALITO: But that can be done
14 by -- it can be done by Congress. It can be
15 done by regulation. But it's quite something
16 to find six months in the Constitution. Where
17 does it say six months in the Constitution?
18 Why is it six? Why isn't it seven? Why isn't
19 it five? Why isn't it eight?

20 MR. ARULANANTHAM: Yes, Your Honor, it
21 doesn't say it in the Constitution. It didn't
22 say 14 days in Justice Scalia's opinion in
23 Shatzer.

24 JUSTICE ALITO: Yeah, that's the only
25 example I can think of, but there, that's

1 entirely within the power, the control of the
2 -- of the government entity making the arrest.
3 So you arrest somebody, you've got a certain
4 period of time, the 48 days -- the 48 hours.
5 It would have to be short, and the 48 hours is
6 just -- provides clarity.

7 But this is -- this is different.
8 There are many factors that can go into the
9 question of whether the delay is unreasonable.
10 Isn't that true?

11 MR. ARULANANTHAM: Well, I don't think
12 that -- let me answer two ways, Your Honor.
13 First, Congress previously doubted the
14 constitutionality of detention beyond six
15 months in Zadvydas. It's also in McNeil a
16 useful benchmark for a civil commitment --

17 JUSTICE ALITO: Well, how -- do you
18 say Congress doubted the constitutionality --

19 MR. ARULANANTHAM: I'm just quoting --
20 I'm just quoting the Court in Zadvydas. And
21 that's it.

22 But, Your Honor, the -- the other
23 argument for it really arises from the fact
24 that, you know, when detention becomes
25 prolonged, something is fundamentally

1 different. So you have to draw a line
2 somewhere, or else you don't end up with, you
3 know, an administrable rule. And what we --
4 what we've seen in the decade of litigation on
5 this subject since Demore is that the lower
6 courts that failed to -- I mean, it didn't even
7 start out that way. The Ninth Circuit first
8 said detention was unconstitutional if
9 prolonged, or construed the statute in light of
10 that, in 2005.

11 And then there were more cases. Four
12 and a half years detention, I had a client in
13 2006; seven years detention in
14 Casas-Castrillon, another case that came, I
15 think, another year later. The Third Circuit,
16 the same thing happened. They first said it
17 was unconstitutional or, excuse me, they
18 construed the statute to avoid the
19 constitutional problem, which I know Your Honor
20 is not a huge fan of, but, you know, they did
21 that first, and then four -- four years later,
22 there's been two other cases.

23 And so then they start saying we have
24 to have some kind of guidepost. So that's I
25 think the rationale --

1 CHIEF JUSTICE ROBERTS: Those are
2 certainly --

3 MR. ARULANANTHAM: -- for a temporal
4 rule.

5 CHIEF JUSTICE ROBERTS: Those are
6 certainly outlier cases. And, you know, they
7 obviously -- concerns are heightened as you get
8 beyond -- as you extend the time period.

9 But six months, I mean, the time
10 period that you've selected, how long -- what
11 is --

12 MR. ARULANANTHAM: Yes, Your Honor.

13 CHIEF JUSTICE ROBERTS: Give me some
14 sense of how I can figure out how often that is
15 an issue with respect to the broad group of
16 people that are --

17 MR. ARULANANTHAM: Absolutely, Your
18 Honor.

19 If you look at EOIR updated
20 statistics, so the government's statistics that
21 they published in FY 2015, which they cite in
22 their -- somewhere in their -- in their briefs,
23 is when they -- when they corrected the error
24 in *Demore v. Kim*, they cited it there, the
25 updated statistics were published, 90 percent

1 of all detention cases under mandatory
2 detention finish in less than six months.

3 So six --

4 JUSTICE KENNEDY: What did you say?

5 MR. ARULANANTHAM: Less than six
6 months. So six months, our class, is the
7 outliers. You know, we are the outliers. And
8 the reason for that is because our class is the
9 people who have substantial defenses. And it
10 is true that --

11 CHIEF JUSTICE ROBERTS: Well is that
12 -- but just taking the outliers, the government
13 makes the point that in many cases those
14 individuals are compiling an evidentiary record
15 to substantiate their -- their claims. So that
16 that should be taken into account in
17 considering how -- how long it is.

18 And I suppose the government's
19 alternative of individualized assessment, which
20 would take into account whether or not the
21 people are using the time to compile a record
22 or not and are particularly interested in
23 getting out now as opposed to in three months
24 or whatever, why doesn't the suitability of
25 individualized -- the availability of

1 individualized relief through habeas or another
2 procedure become more plausible to the extent
3 you're dealing with a smaller category of
4 cases?

5 MR. ARULANANTHAM: So although it's
6 only 10 percent that go beyond six months, it's
7 still thousands of case. You know, if you take
8 just snapshot data on any given day, we got
9 that data for our class, it was 400 people in
10 the Central District of California on any given
11 day. It was a 1,000 people over the --

12 CHIEF JUSTICE ROBERTS: Some of
13 whom -- some of whom, as we've been discussing
14 are there because they're compiling evidence --

15 MR. ARULANANTHAM: Right.

16 CHIEF JUSTICE ROBERTS: -- to make --
17 allow them to make a stronger case, and it's
18 not clear why --

19 MR. ARULANANTHAM: Understood.

20 CHIEF JUSTICE ROBERTS: -- that
21 shouldn't be a consideration that diminishes
22 their claim.

23 MR. ARULANANTHAM: Right. Understood,
24 Justice. So let me answer that portion of it.

25 We fundamentally disagree on the

1 question whether you get a hearing to assess
2 whether your detention is lawful or not where
3 the reason for the delay is because you're
4 compiling a record and pursuing relief.

5 I think, you know -- I agree that if
6 you want to give up and go home -- you know,
7 Mr. Rodriguez came here at the age of one, so,
8 you know, I'm not sure where home is, but,
9 anyway -- and, in fact, a huge majority,
10 something like two-thirds of the Mandatory
11 Subclass, came here prior to the age of 21. So
12 -- and they have -- 60 percent have U.S.
13 citizen children or spouses. But anyway, if,
14 you know, if you want to leave, then you can
15 give up and you control the length of time in
16 your case; true.

17 But if you want to apply for any
18 relief, or make any defense, you want to
19 contest the charge, anything like that, you do
20 not have control over how long your case will
21 take anymore.

22 CHIEF JUSTICE ROBERTS: I'm not
23 talking -- I understand -- I understand I think
24 both the government's point and your response
25 about you hold the keys in your pocket and why

1 that's not satisfactory in -- in every case.
2 But my question is that it's -- it's not
3 everybody who is -- the government is not
4 entirely responsible for the length of time
5 that the individual or the individuals are
6 being detained.

7 MR. ARULANANTHAM: Yes, and, Your
8 Honor --

9 CHIEF JUSTICE ROBERTS: And -- and I'm
10 just trying to get a number. You say 400
11 people in -- in -- in where? In the Central
12 District --

13 MR. ARULANANTHAM: In the Central
14 District of California.

15 CHIEF JUSTICE ROBERTS: Central
16 District of California.

17 MR. ARULANANTHAM: Yes.

18 CHIEF JUSTICE ROBERTS: And the number
19 of people who are not partially responsible for
20 that delay themselves is -- is some smaller
21 percentage of that.

22 MR. ARULANANTHAM: Yeah.

23 CHIEF JUSTICE ROBERTS: And I'm
24 wondering, as the number gets smaller and
25 smaller, at some point the prospect of

1 individual rather than -- individual
2 application rather than unusual class-wide
3 relief becomes a more palatable option.

4 MR. ARULANANTHAM: Understood, Your
5 Honor. I think if the Court were to hold that
6 you don't even get a hearing, you don't even
7 get to look at your detention, if you are
8 partly responsible for the delay insofar as
9 you're litigating your case, then almost nobody
10 will get out, and you're right that the number
11 of habeas petitions will be very small, you
12 know, assuming that this would be done through
13 individual habeas petitions.

14 But I disagree with the premise
15 because I don't think it's fair to say that you
16 control the length of your detention just -- I
17 mean, you control it in the sense that you
18 could give up, but beyond that, you do not
19 control it.

20 CHIEF JUSTICE ROBERTS: No, control is
21 -- right. I'm thinking something of the way we
22 approach speedy trial claims. In deciding
23 whether or not you've been deprived of a speedy
24 trial, you have to take out of the calculation
25 times when you've asked for a continuance and

1 so on and so forth.

2 MR. ARULANANTHAM: Right. And that
3 analogy is -- is I think fundamentally
4 misguided, you know, because the Speedy Trial
5 Act gives you release, and it gives you
6 dismissal of the prosecution if, after you do
7 the calculation you describe, you know there
8 has been a violation. It applies even if
9 people are not detained, right, because the
10 government has a separate obligation to pursue
11 a proceeding in an expeditious manner.

12 There's probably some speedy
13 trial-like constraint also in the immigration
14 context, but we haven't argued that. The Due
15 Process Clause is a separate constraint, which
16 is detention has to be necessary to serve its
17 purpose.

18 And even if you are litigating your
19 case in good faith, because you're a U.S.
20 citizen's wife or because Mr. Rodriguez has,
21 you know, a baby child at home, he misses the
22 first three years of his child's life, you
23 know, that is because he's pursuing relief.
24 So, in that sense, he is responsible. But it
25 doesn't make him a flight risk. You know, and

1 so all we're saying is that, for that reason,
2 you should be able to get the hearing on due
3 process grounds, not speedy trial, you get it
4 on due process grounds when the detention has
5 become prolonged.

6 And while the judge may say, you know
7 what, you are pursuing dilatory tactics, you
8 don't have a good faith claim here, or I think
9 you're going to flee, I think even putting an
10 ankle monitor with a GPS device on you is not
11 going to be good enough or you have a horrible
12 criminal history, then that's fine; that person
13 gets detained. But the other people for whom
14 that is not true, which is a lot of people in
15 our class, you know, those people should have
16 the chance to -- to make the case in front of
17 the immigration judge.

18 Your Honor --

19 JUSTICE ALITO: Well, why do you say
20 -- why do you say it should -- it should happen
21 at six months? Why shouldn't it happen
22 immediately?

23 MR. ARULANANTHAM: Your Honor, we --
24 we thought it should happen immediately. In
25 *Demore v. Kim*, we lost. And I think that the

1 Court accepted the idea that a categorical
2 generalization, rather than an individualized
3 assessment, was okay for brief detentions as to
4 people who had conceded their deportability.
5 So -- and that's essentially it, you know.

6 If -- if -- that may be fine and you
7 don't need that hearing on day one, but once
8 your case has taken a long time, deprivation of
9 liberty is greater, then you need --

10 JUSTICE ALITO: But what -- does that
11 reflect the idea that there is a significant
12 flight risk in this category of cases? That's
13 why there's the six-month rule?

14 MR. ARULANANTHAM: You know -- sorry,
15 you mean the six-month rule from Demore?
16 Congress -- Congress said, and we disagree with
17 this because I think -- the Congress said that
18 there was significant flight risk concerns
19 here. That was because of their lack of bed
20 space, you know, but that's -- that's -- that
21 ship has passed, as long as Demore is good law;
22 you know, the -- the Court said, you know,
23 that's a -- that's a sufficient justification.
24 But it didn't foreclose our showing in a case
25 like this.

1 JUSTICE GORSUCH: Counsel, building on
2 that, I can imagine some individuals thinking
3 that they have a good argument that they should
4 be released before six months, at some point
5 between zero and six months.

6 Would the class-wide relief preclude
7 those claims and, if not, and we're going to be
8 doing individualized claims anyway for the
9 period of zero to six months, what -- what do
10 we gain by creating this bright line rule?

11 MR. ARULANANTHAM: We defined the
12 classes that we thought was the outer limit. I
13 agree with you. I think there may be -- Your
14 Honor, excuse me -- that there may be people
15 who are entitled to hearings before that.

16 I don't read this as foreclosing that
17 because, you know, the maximum -- or the sort
18 of most favorable relief we sought was
19 detention -- excuse me -- was -- was hearings
20 at six months.

21 So I think we've foreclosed -- yeah,
22 we've foreclosed the claims we pled but, you
23 know, don't -- don't foreclose, you know, for
24 the -- for the things that we didn't ask for.

25 JUSTICE GORSUCH: So we're still going

1 to have individualized claims between zero and
2 six months and individualized claims, I assume,
3 between six months and 12 months and so forth?

4 MR. ARULANANTHAM: Well, hopefully not
5 the latter if -- if we were to win on six
6 months, but as to the initial --

7 JUSTICE GORSUCH: Well, why not? If
8 they're detained at six months, but conditions
9 change between six and 12, I would -- I would
10 want to bring a habeas petition at that point.

11 MR. ARULANANTHAM: I under -- I
12 understand, Your Honor.

13 So first, as to the short, the before
14 six months, as a practical matter, very
15 unlikely because it is impossible to get a
16 habeas adjudicated most of the time before six
17 months.

18 The American for Immigrant Justice
19 brief at page 31, it co-lists the statistics.

20 JUSTICE GORSUCH: I would hope that in
21 detention habeas petitions get prompt
22 attention.

23 MR. ARULANANTHAM: You would hope so,
24 Your Honor, but in practice --

25 JUSTICE GORSUCH: Yeah.

1 MR. ARULANANTHAM: -- it -- it takes
2 19 months in the Eleventh Circuit. It takes
3 about 14 months, I think, in the Third. The
4 fastest circuit --

5 JUSTICE GORSUCH: To get before a
6 judge at all or to have it finally adjudicated?

7 MR. ARULANANTHAM: To have it finally
8 adjudicated.

9 JUSTICE GORSUCH: Okay.

10 MR. ARULANANTHAM: To have it finally
11 adjudicated.

12 But -- but part of the problem, Your
13 Honor, is they're assessing all these
14 individualized factors, which they don't know
15 about, because they don't have the case in
16 front of them, and that takes time. The
17 immigration judge --

18 JUSTICE BREYER: How has it worked?
19 I'd assume that the reason six months is not
20 picked out of the air but, rather, six months
21 reflects what's -- reflects Zadvydas, where it
22 wasn't absolutely six months, it was
23 presumptively six months.

24 MR. ARULANANTHAM: Right.

25 JUSTICE BREYER: And you could say

1 your continued detention was unreasonable prior
2 to six months, and you could say it was
3 reasonable up to eight months, all those things
4 were true of that case.

5 MR. ARULANANTHAM: Right.

6 JUSTICE BREYER: Now, how has that
7 worked out?

8 I assume that it has worked out that
9 the problems that had been raised are not
10 overwhelming and, therefore, for purposes of
11 uniformity, which gives the government some
12 time, like many times what it has in an
13 ordinary criminal case, to proceed, and yet
14 doesn't have the extreme detention, that that's
15 where that number comes from.

16 So how has that worked out in the
17 Zadvydas context?

18 MR. ARULANANTHAM: Your Honor, let me
19 answer both that and then just finish answering
20 Justice Gorsuch's question.

21 I think Zadvydas has worked out quite
22 well. You know, after -- there was one big
23 dispute, which is does it apply to
24 excludeables. That was resolved in Clark v.
25 Martinez. You know, I don't -- I'd be

1 surprised if Your Honors have seen a cert
2 petition. I certainly am not aware of one
3 arising out of Zadvydas.

4 You know, in contrast, the Demore
5 rule, you've got our case, you've got Prayopp,
6 which is currently pending before this Court,
7 and there is other -- I mean, there's a lot of
8 litigation that arose from trying to figure out
9 the limits on Demore, unlike Zadvydas.

10 Just to go back briefly, Your Honor,
11 the immigration judge, if they are the one
12 conducting the hearing, it does not take them
13 long to make this assessment. The hearings
14 take about 10 to 15 minutes actually just
15 because they have the merits case, right. The
16 habeas court, totally a different story.

17 As to the -- the later habeases, Your
18 Honor, that's part of the justification in our
19 view for periodic review. It is also a rule of
20 administrability. It ensures that there's
21 another look at the hearing -- at the detention
22 after one month -- excuse me -- after one year.

23 You know, it might be that what was
24 sufficient to detain at six months, that --
25 that's not sufficient to detain after six

1 years, which is how long Mr. Rodriguez's case,
2 you know, took to finish. And in their view,
3 all of his detention for that entire time would
4 have been justified because it's his fault, he
5 is the one who is trying to challenge his
6 claim.

7 And even when he gets to the Ninth
8 Circuit, the government confesses error, and
9 then remands it back, you know, but -- but he's
10 still the one pursuing relief. And he can go
11 home to Mexico, which he hasn't been since the
12 age of one. And so that's why --

13 CHIEF JUSTICE ROBERTS: Well, I don't
14 think the government -- I don't think the
15 government says that the entire period is his
16 fault because he's pursuing relief. I think
17 their point was there are discrete periods
18 where they're actually trying to compile a
19 record.

20 They're not suggesting simply because
21 he's seeking relief, they can keep him as long
22 as they want because he can always give up the
23 relief.

24 MR. ARULANANTHAM: I -- I would hope
25 that is their position, Your Honor. I guess my

1 -- my broader point would still be that the
2 fact that he's pursuing relief, if it's
3 dilatory, that should -- you should not let
4 that person out, and the immigration judge can
5 make that assessment.

6 If it's a plausible claim, a colorable
7 claim, which it obviously was in his case, then
8 he shouldn't have to be locked up.

9 JUSTICE GINSBURG: May I ask a --

10 JUSTICE SOTOMAYOR: Counsel, can I go
11 to the 12 --

12 JUSTICE GINSBURG: May I ask you a
13 procedural question before? Suppose we reject
14 your constitutional avoidance question.

15 Would there be any impediment to the
16 relief you are seeking if we were to remand it
17 to the Ninth Circuit to take a first view of
18 the constitutionality?

19 MR. ARULANANTHAM: I mean, obviously,
20 the Court could do that, certainly. It's
21 within its power to do that. I'm not sure if
22 that's -- but we're continuing to press the
23 construction claim as well, although I haven't
24 discussed it, but, yes, the Court could do
25 that.

1 That being said, the Ninth Circuit I
2 think quite clearly viewed the relief as
3 necessary to vindicate constitutional rights.
4 It said that at the end of the opinion, that
5 the purpose of these hearings is to make sure
6 that the detention actually serves its purpose.

7 So, you know, I can come back for
8 Number 3 perhaps, Your Honor.

9 JUSTICE SOTOMAYOR: Counsel, can I ask
10 you a practical question?

11 MR. ARULANANTHAM: Yes.

12 JUSTICE SOTOMAYOR: I -- I have seen
13 the statistics that since the Ninth Circuit
14 order, under the 1226(a) category, there have
15 been more people released than previously.

16 Why? Under 1226(a), you get a bail
17 hearing before an INS judge. The burden is on
18 the -- on the -- on the immigrant to prove that
19 they're not a flight risk and are not a danger
20 to the community. And they can make a motion
21 to have that situation relooked at.

22 MR. ARULANANTHAM: I have two guesses,
23 Your Honor. Sorry. Sorry.

24 JUSTICE SOTOMAYOR: Yeah. And so what
25 is it that has changed the outcome so much?

1 MR. ARULANANTHAM: Right. So I'm not
2 -- I'm not actually aware of the particular
3 statistics you're referring to, but my two
4 guesses as to why there might be more releases,
5 one is the burden shifts after six months, even
6 for 1226(a) detainees, and they get also a
7 requirement that alternatives to detention be
8 considered under the injunction. That didn't
9 exist under regular 1226(a).

10 And second, Your Honor, as a practical
11 matter, we know, you can see it in the Metidat
12 declaration, in the Inlander declaration, even
13 people who are eligible under changed
14 circumstances for bond hearings, they don't
15 have lawyers, they don't know that rule. They
16 don't read the regulation. Whereas when you
17 have a periodic hearing, the people get the
18 hearing automatically and they're more likely
19 to get access to the Court. I mean, for sure
20 --

21 JUSTICE BREYER: What is your answer
22 -- what is your argument on statutory -- I
23 don't get the statutory part on the second
24 part.

25 MR. ARULANANTHAM: Yes, Your Honor.

1 JUSTICE BREYER: Which is that, you
2 know, the criminals, they finish their
3 sentence, they're finished. After there's a
4 final deportation order, you can only keep them
5 six months, roughly, while you're looking for a
6 country, but in between the time they are
7 released, finish sentence, and there is no
8 final deportation order, keep them for months
9 and months and months without a bail hearing.

10 So, but the statute says shall take
11 them into custody when he's released from his
12 prison time, and then it says the Attorney
13 General may release only if, basically, the AG
14 is necessary witness protection.

15 MR. ARULANANTHAM: Right. Your Honor,
16 let me --

17 JUSTICE BREYER: Now I can't figure
18 out a way, how do you interpret the statute to
19 get around that even under constitutional
20 components?

21 MR. ARULANANTHAM: Right, Your Honor.
22 Let me briefly answer that and then turn to
23 Arrivings, because I see that my time is
24 limited and we haven't discussed that yet.

25 We have nothing new to say on the

1 subject. The two arguments were Your Honors'
2 decision in Zadvydas required that Congress
3 speak in clear terms to authorize a prolonged
4 detention.

5 We read only if as allowing release
6 even as to brief detentions, and we know that
7 Congress understood this because in the Patriot
8 Act they did clearly authorize detention beyond
9 six months even for pending cases under 1226a,
10 with no parentheses. That's -- that's the
11 argument.

12 If I may turn briefly to the
13 Arrivings, Your Honor. Just three quick
14 points. You know, first, my friends twice in
15 their briefs defended or cited Matter of X-K-
16 as though it was a description of the law.

17 So, on the question whether you do get
18 a bond hearing under 1226(a) if you cross in
19 the desert and shortly after are arrested but
20 then pass the credible fear interview, they --
21 they -- I thought they had endorsed that. They
22 say it in their -- in their brief.

23 He now relies on the regulation. If
24 you look at our opening brief on this question,
25 which is unanswered by the government, the

1 problem with the regulation, with relying on
2 the regulation is that the statute, 1226(a),
3 says attorney general in it.

4 And the attorney general cannot then
5 turn around and give that authority to the DHS.
6 If Congress gave it to the attorney general,
7 the attorney general's delegate has to exercise
8 that. And that's the BIA's decision in the
9 Matter of Garcia/Garcia, that the immigration
10 judges are the attorney general's delegate. So
11 that's why they are the ones who have to decide
12 as a statutory matter when someone passes the
13 credible fear interview and are in their full
14 removal proceeding, whether they're entitled to
15 release on bond.

16 And the advantage of that -- I mean, I
17 think that's the best reading of the statute,
18 period, even if there's no constitutional
19 problem because, you know, as we discussed last
20 time, Justice Kennedy, there's a neighboring
21 provision for people who are denied credible
22 fear that says you shall be detained pending
23 the removal proceeding. This one only says
24 shall be detained for the proceeding, like I'm
25 standing in line for the movie or I'm studying

1 for an exam, you know, that's how we read the
2 provision.

3 And certainly, if you add the
4 constitutional question of whether, if you
5 can't put them to hard labor, as in Wong Wing,
6 and you can't torture or -- or shoot them, you
7 also can't detain them for no reason
8 whatsoever, you know.

9 And the government concedes -- I -- I
10 -- I took my friend to be saying we agree or at
11 least in practice, not as a constitutional
12 matter, but we released the people who are not
13 a danger or flight risk after they have passed
14 a credible fear interview.

15 So then our constitutional dispute is
16 really quite narrow, it's just whether the
17 jailer gets to make that decision, I think
18 you're not a danger or a flight risk, or
19 instead a neutral, the immigration judge, who's
20 got the case, should be the one making the
21 decision.

22 Because we both agree that if they're
23 not a danger or a flight risk and they've
24 passed the credible fear interview, they should
25 get out. You know, and as we saw, you know,

1 two-thirds of this class, these people who
2 passed the credible fear interview, they win
3 asylum, even when they're detained. You know,
4 that number surely goes up when you get out of
5 -- when you get out of prison, when you're
6 talking about a class of people who have fled
7 horrific persecution in some cases.

8 And in that situation, we think that
9 it's entirely appropriate for the Court to find
10 that those people have a right to be free from
11 arbitrary detention. And that's the reason why
12 we would request the Court affirm the
13 injunction as to the Arrivings, as well as with
14 respect to everybody else.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Stewart, two minutes.

18 REBUTTAL ARGUMENT OF MALCOLM STEWART.
19 ON BEHALF OF THE PETITIONERS

20 MR. STEWART: Thank you, Mr. Chief
21 Justice.

22 I'd like to focus on the criminal
23 aliens, because I think I spent most of my
24 initial time on the arriving aliens.

25 Justice Kagan referred to the

1 correction of the statistics that were before
2 the Court in Demore versus Kim, but I think
3 it's important to -- to emphasize that most of
4 what the Court thought to be true at the time
5 of Demore was true; that is, the Court said
6 this detention has a natural stopping point
7 because it lasts only as long as the removal
8 proceedings are ongoing. That's still true.

9 The Court said the large majority of
10 cases, the IJ's decision is not appealed, and
11 in those cases, the average and median times of
12 detention are about a month, and that was true.

13 The one respect in which the detention
14 times have turned out to be much longer than
15 the Court in Demore thought they were was in
16 the category of cases around 10 to 15 percent
17 where an appeal from the IJ decision is taken
18 to the BIA.

19 But the large majority of those cases
20 are cases involving an alien who loses before
21 the IJ and takes his own appeal. And so to the
22 extent that the Court was misinformed about the
23 -- the statistics, it's really in a category of
24 cases where it's the alien's own volitional
25 choice that causes a further stage of the

1 proceedings to be triggered.

2 That's not to say that the alien is at
3 fault. It's to say that the Court should use
4 the same methodology that it uses under the
5 Speedy Trial Clause, the Speedy Trial Act where
6 in determining whether a delay has been undue,
7 the Court focuses on the reasons for the delay,
8 whether it's attributable to some improper act
9 by the government.

10 Counsel -- opposing counsel said at
11 the end that really the constitutional dispute
12 as to the arriving aliens has been
13 crystallized. It's just a question about who
14 makes the decision. And that goes to the very
15 essence of this Court's holdings, that aliens
16 at the threshold have no constitutional rights
17 under the due process clause.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. The case is submitted.

20 (Whereupon, at 12:05 p.m. the case was
21 submitted.)

22

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24

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1	<p>above-entitled ^[1] 1:15 absolutely ^[2] 45:17 56:22 accept ^[2] 7:1 14:9 accepted ^[2] 35:4 53:1 accepting ^[1] 25:24 access ^[1] 62:19 account ^[2] 46:16,20 accused ^[1] 11:12 act ^[7] 28:17,18 38:2 51:5 64:8 69:5,8 action ^[1] 25:7 actual ^[1] 21:13 actually ^[10] 21:9 30:11 34:6,25 38:1 39:7 58:14 59:18 61:6 62:2 add ^[1] 66:3 addition ^[1] 33:12 adequate ^[1] 5:21 adequately ^[1] 5:21 adjudicated ^[4] 55:16 56:6,8,11 adjudicator ^[1] 29:20 adjustment ^[1] 34:21 administrability ^[1] 58:20 administrable ^[1] 44:3 administration ^[1] 16:21 admission ^[1] 15:13 admits ^[1] 17:4 admitted ^[1] 21:1 adopt ^[1] 14:7 adopted ^[1] 28:25 advantage ^[1] 65:16 adverse ^[1] 25:13 affirm ^[1] 67:12 ag ^[1] 63:13 age ^[3] 48:7,11 59:12 agency ^[4] 10:22 11:20 13:4 42:9 agency's ^[1] 41:21 agent ^[1] 6:22 agree ^[7] 12:18 21:22 33:20 48:5 54:13 66:10,22 agreed ^[1] 24:24 ahead ^[1] 26:19 ahilan ^[3] 1:23 2:8 30:24 air ^[1] 56:20 airport ^[1] 19:24 al ^[2] 1:3,6 alejandro ^[1] 1:6 alien ^[23] 4:7,13,21,22 5:6,19,22 9:7,8,12 14:17,19,20 18:18 21:3 23:24 25:20,23 26:14 29:21 30:17 68:20 69:2 alien's ^[1] 68:24 aliens ^[30] 3:13 4:19 5:1 6:9,17 7:13,17,21,24 8:11 9:1 10:5 12:5,10,13 13:8,10,15,20 14:15 22:18 23:16 24:10 25:10 26:11,21 67:23,24 69:12,15 alito ^[12] 19:20 26:17,19 27:5 28:6,8,9 42:13,24 43:17 52:19 53:10 allow ^[3] 11:19,21 47:17 allowed ^[4] 3:14,20 17:20 18:18 allowing ^[1] 64:5 alluded ^[1] 12:12 almost ^[3] 6:10 33:16 50:9 alone ^[1] 6:20</p>	<p>already ^[2] 15:19 36:17 alternative ^[2] 21:4 46:19 alternatives ^[2] 39:1 62:7 although ^[3] 42:9 47:5 60:23 altogether ^[1] 18:16 amended ^[1] 38:2 american ^[1] 55:18 amount ^[2] 29:18 30:8 analogizing ^[1] 31:17 analogy ^[2] 32:12 51:3 analysis ^[1] 30:14 angeles ^[2] 1:23 11:15 ankle ^[1] 52:10 another ^[4] 44:14,15 47:1 58:21 answer ^[17] 8:7 16:25 17:15 18:20 19:14,15,16 25:17,18,19 26:2,7 43:12 47:24 57:19 62:21 63:22 answering ^[1] 57:19 anyway ^[3] 48:9,13 54:8 appeal ^[3] 25:13 68:17,21 appealed ^[1] 68:10 appeals ^[1] 40:25 appearance ^[1] 39:3 appearances ^[1] 1:19 appears ^[1] 31:20 appendix ^[2] 4:10 14:11 application ^[3] 4:24 15:15 50:2 applies ^[3] 14:5 16:17 51:8 apply ^[5] 9:2 36:13 41:6 48:17 57:23 approach ^[1] 50:22 appropriate ^[2] 30:13 67:9 arbitrarily ^[1] 20:22 arbitrariness ^[1] 8:5 arbitrary ^[6] 16:6 18:3,3,6,7 67:11 area ^[3] 6:21 7:20 20:11 areas ^[1] 15:8 aren't ^[1] 23:9 arguably ^[1] 31:22 argue ^[1] 40:9 argued ^[4] 37:14 39:23,24 51:14 argument ^[15] 1:16 2:2,7,10 3:4,7 17:4 30:24 38:6 40:3 43:23 54:3 62:22 64:11 67:18 arguments ^[1] 64:1 arises ^[1] 43:23 arising ^[1] 58:3 arose ^[1] 58:8 around ^[4] 35:22 63:19 65:5 68:16 arrest ^[6] 10:13,17 12:6 32:14 43:2,3 arrested ^[6] 12:22 14:19,20,22 19:16 64:19 arrive ^[2] 12:10 18:5 arrived ^[1] 12:16 arrives ^[2] 9:8 21:3 arriving ^[14] 4:7,13 6:17 7:21,22 11:5 13:20 15:1 18:18 22:18 32:23 34:22 67:24 69:12 arrivings ^[4] 33:17 63:23 64:13 67:13 arulanantham ^[59] 1:23 2:8 30:23,24 31:1 32:8 33:4 34:3 35:9 36:1,7,10,19,23 37:5,10,19,23 38:8 39:</p>	<p>21 41:18,20 42:20 43:11,19 45:3,12,17 46:5 47:5,15,19,23 49:7,13,17,22 50:4 51:2 52:23 53:14 54:11 55:4,11,23 56:1,7,10,24 57:5,18 59:24 60:19 61:1,11,22 62:1,25 63:15,21 as-applied ^[1] 27:23 aside ^[1] 32:9 assert ^[2] 3:24 9:3 asserting ^[1] 29:6 assess ^[3] 22:4 39:6 48:1 assessing ^[1] 56:13 assessment ^[4] 46:19 53:3 58:13 60:5 assume ^[4] 28:10 55:2 56:19 57:8 assumes ^[1] 7:8 assuming ^[1] 50:12 asylum ^[11] 4:16,20,24 5:9 7:6 21:18 23:25 26:8 34:15,22 67:3 attack ^[1] 35:19 attacks ^[1] 35:19 attention ^[1] 55:22 attorney ^[7] 14:18 63:12 65:3,4,6,7,10 attributable ^[5] 22:1,8,25 25:7 69:8 attribute ^[1] 22:10 authority ^[3] 3:12 14:10 65:5 authorize ^[3] 14:24 64:3,8 authorized ^[1] 40:18 automatically ^[1] 62:18 availability ^[1] 46:25 available ^[2] 9:5 22:14 avenues ^[1] 9:5 average ^[1] 68:11 avoid ^[2] 22:7 44:18 avoidance ^[1] 60:14 award ^[1] 16:22 aware ^[3] 29:2 58:2 62:2 away ^[1] 15:18 awful ^[1] 20:11 ax ^[1] 11:11</p>
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