Nos. 19-1787, 19-1900

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

MARK ANTHONY REID; ROBERT WILLIAMS, on behalf of himself and others similarly situated; LEO FELIX CHARLES, on behalf of himself and others similarly situated

Petitioners–Appellants/Cross–Appellees

v.

CHRISTOPHER J. DONELAN, Sheriff, Franklin County, Massachusetts; LORI STREETER, Superintendent, Franklin County Jail & House of Correction; THOMAS M. HODGSON, Sheriff, Bristol County, Massachusetts; JOSEPH D. MCDONALD, JR., Sheriff, Plymouth County, Massachusetts; STEVEN W. TOMPKINS, Sheriff, Suffolk County, Massachusetts; CHAD WOLF, Acting Secretary of the Department of Homeland Security; DENIS C. RIORDAN, Director, Immigration and Customs Enforcement Boston Field Office; WILLIAM P. BARR, Attorney General; JAMES MCHENRY, Director of the Executive Office for Immigration Review; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; DAVID DUBOIS, Sheriff, Strafford County, New Hampshire; CHRISTOPHER BRACKETT, Superintendent, Strafford County House of Corrections; MATTHEW T. ALBENCE, Acting Director, Immigration and Customs Enforcement

Respondents–Appellees/Cross–Appellants

ON REVIEW FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS NO. 3:13-cv-30125-PBS

BRIEF OF THE STATES OF CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, MASSACHUSETTS, MINNESOTA, NEVADA, NEW MEXICO, NEW YORK, OREGON, VERMONT, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF MARK ANTHONY REID, et al.

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IDENTITY AND INTEREST OF AMICI STATES[1]

Amici are the states of Connecticut, Delaware, the District of Columbia, Massachusetts, Minnesota, Nevada, New Mexico, New York, Oregon, Vermont, and Virginia ("Amici States"). They submit this brief to protect their residents' rights and their own interests against a federal attempt to indefinitely detain immigrant residents in the absence of basic constitutional safeguards.

The Amici States do not contest the federal government's power to detain individuals for reasonable periods pending immigration court hearings, with appropriate procedural protections. Instead, the Amici States support and promote the foundational principle that "in our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). This case is about policing those limitations and ensuring that the exception does not swallow the rule.

The Amici States have a substantial interest in enforcing due process guarantees against arbitrary and unreasonable detention. That is part of the states' role in our federalism, in which two sovereigns –

[1] This brief is submitted pursuant to Federal Rule of Appellate Procedure 29(a)(2).

state and national – share responsibility for protecting individual freedoms and rights.[2] In defending the due process rights of our immigrant residents, the Amici States are upholding our founding constitutional bargain.

The Amici States also have a strong interest in ensuring that their residents are not unnecessarily detained. The petitioner class here – like others around the country who are similarly situated – includes integral members of our communities who contribute to our economies and civil societies. Many of them pose no public safety or flight concerns – and many will ultimately demonstrate a right to remain in this country. Their categorical and prolonged detention harms their families, who are deprived of financial and emotional support; their employers and employees; and Amici States, who experience decreased tax revenues, increased social service payments, and diminished economies and communities.

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[2] *See The Federalist No. 51*, at 323 (James Madison) (Clinton Rossiter ed., 1961) (dual sovereignty creates "a double security" for the American people).

SUMMARY OF ARGUMENT

Prolonged pre-removal detention is a serious imposition on liberty. It shatters lives. It harms children and families; it breaks down communities; and it shrinks state economies and harms the public fisc.

Those individual and societal costs are sometimes unavoidable to protect the public and ensure that immigrants in removal proceedings come to court. But the government cannot impose such significant costs without providing the substantial safeguards mandated by our constitutional order.

"[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection," *Addington v. Texas*, 441 U.S. 418, 425 (1979), and the Amici States' shared history and current practices are "weighty evidence" in determining the process that is due when the government deprives individuals of their liberty. *Estes v. Texas*, 381 U.S. 532, 540 (1965). Like their sister states across the country, the Amici States reject prolonged detention in the absence of protections consistent with those sought by petitioners. In the criminal context, the states accept and bear the burden of justifying prolonged pre-trial detention at mandatory hearings. And in the civil

context, the states do not involuntarily detain residents for extended periods of time without mandatory hearings at which the states must show the need for commitment by clear and convincing evidence.

The states' universal rejection of prolonged detention without substantial protections in criminal and civil contexts show that the public interest does not require the prolonged and virtually process-free detention to which the federal government seeks to subject the petitioners. In fact, the public interest – a key consideration in the balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976) – cuts the other way. The prolonged and unnecessary detention of immigrants that can occur absent substantial due process protections can be devastating to states, communities, and families.

The government's practices here result in the prolonged detention of many residents of Amici States. While detention may be shown to be justified for some, others pose no threat. Some will ultimately win post-conviction relief from their convictions.[3] Some may be pardoned for

[3] *See In re Song*, 23 I. & N. Dec. 173, 173-74 (BIA 2001); *In re Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (BIA 2000).

their offenses.[4] Many have strong immigration cases, including through cancellation or withholding of removal and relief under the Convention Against Torture. And, in fact, many will ultimately win relief – as fully 27% of the class constituted earlier in this litigation already has.[5]

As this Court strikes the balance required by due process between government and individual interests, it should consider the private and public interests of these residents, their families, and the Amici States. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (acknowledging the "significant social costs borne by our Nation" in the course of a due process analysis.) Imposing procedural requirements consistent with petitioners' requests protects those interests and is consonant with the long traditions of Amici and their sister states.

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[4] *See, e.g., Wayzaro Walton,* A041-657-385 (BIA Dec. 5, 2019) (unpublished opinion) (recognizing Connecticut's pardon of detained immigrant, and her right to remain in the United States).

[5] *Reid v. Donelan*, 390 F.Supp.3d 201, 212 (D. Mass. 2019).

ARGUMENT

I. Due Process Requires Substantial Procedural Safeguards When the Government Detains Immigrants Pending Removal Proceedings.

A. Due Process Is Informed by State History and Practices.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana,* 504 U.S. 71, 80 (1992). The core protection against unreasonable and arbitrary detention extends to immigrants in removal proceedings. *Demore v. Kim*, 538 U.S. 510, 523 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects.").

Evidence of state practices has long informed the Court's understanding of the scope and content of the Constitution's due process guarantees. *See Schad v. Arizona*, 501 U.S. 624, 640 (1991) ("The use here of due process… assumes the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require."); *Clark v. Arizona*, 548 U.S. 735, 748-

52 (2006) (surveying states and concluding that a range of tests used by states to determine insanity indicates that "no particular formulation has evolved into a baseline for due process").[6]

Just as the Court has considered state practices as "weighty evidence" in determining fundamental fairness, *Estes v. Texas*, 381 U.S. 532, 540 (1965), it has also seen state practices as indicia of the extent of the legitimate public interest for the purposes of the balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976). *See, e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 n.17 (1987) ("The importance of the public interest at issue in this case is evidenced by the fact that all 50 States and the District of Columbia have statutes that protect the confidentiality of their official records concerning child abuse."); *Connecticut v. Doehr*, 501 U.S. 1, 17-18 (1991) (determining that a state's claim of interest in prejudgment attachment without a hearing is belied by the fact that "nearly every State requires either a

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[6] *See generally* Corinna Barrett Lain, *The Unexceptionalism of Evolving Standards,* 57 UCLA L. Rev. 365, 382 (2009) ("Granted, the Court also has clarified on several occasions that the states' position on an issue is not conclusive in its due process analysis. Yet over the years, a consensus among the states (or lack thereof) has been described as 'weighty evidence,' 'convincing support,' 'significant,' and a 'primary guide' in the Court's procedural due process analysis.")

preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place"); *Addington v. Texas*, 441 U.S. 418, 426 (1979) (looking to near-unanimity of states in rejecting preponderance of the evidence standard for involuntary commitment of the mentally ill).

The *Mathews v. Eldridge* balancing test applies in the immigration context as elsewhere. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (applying the balancing test).

B. The States Have Consistently and Widely Embraced Procedural Safeguards Including Mandatory Hearings for Individuals Facing Prolonged Detention.

The class members here are detained in Massachusetts and New Hampshire. They are, predominantly, residents of Massachusetts, New Hampshire, and Connecticut.[7] If they were held for a prolonged period of time in the criminal jurisdiction of the states in which they are

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[7] There is no immigration detention facility in Connecticut. *See* U.S. Customs and Immigration Enforcement, *Detention Facility Locator*, https://tinyurl.com/y5v785q7 (last visited Feb. 9, 2020); Matthew Ormseth, *Undocumented Immigrants Detained In Connecticut Face The Highest Average Bond In The U.S.*, The Hartford Courant (Jul. 30, 2018), https://tinyurl.com/vo7nfmk (noting that "[B]ecause Connecticut has no detention centers for immigrants and does not allow Homeland Security to hold them in state jails, they're detained hundreds of miles away, in Massachusetts or New Hampshire.").

detained or the states where they reside, they would be entitled to mandatory bail hearings at which the state would carry the burden of justifying the detention. Conn. Gen. Stat. § 54-64a; Mass. Gen. Laws. ch. 276, §§ 57, 58 (excepting cases of first-degree murder); N.H. Rev. Stat. § 597:2. Even if the government met its burden, the court would be required to consider the viability of alternatives to detention. Conn. Gen. Stat. § 54-63b; Mass. Gen. Laws ch. 276, §§ 57, 58; N.H. Rev. Stat. Ann. § 597:2. They would not be categorically barred from release solely because of a prior conviction or because of their immigration status. *See* Conn. Gen. Stat. § 54-63b(b) (allowing prior convictions to be considered as a factor in determining bail – and not necessarily, much less categorically, a dispositive factor – and omitting immigration status entirely from the list of possible considerations); Mass. Gen. Laws ch. 276, § 58 (same); N.H. Rev. Stat. Ann. § 597:2 (same).

Connecticut, Massachusetts, and New Hampshire are hardly outliers. No state allows prolonged pre-trial detention without a mandatory hearing at which the state bears the burden of proof. *See, e.g.*, Alaska Stat. § 12.30.011 (providing for presumption of release in

criminal cases); Wis. Sat. § 969.01 (providing presumption of bail release.).[8]

The states' traditions and practices are equally clear and consistent in the context of civil detention. If petitioners here were facing civil commitment for mental illness in Connecticut, Massachusetts, or New Hampshire – the states where they reside or are detained – they would be entitled to a hearing at which the government would bear the burden of showing, by at least clear and convincing evidence, that confinement is necessary. Conn. Gen. Stat. § 17a-498; N.H. Rev. Stat. Ann. § 135-C:31; Mass. Gen. Laws ch. 123, §§ 7, 8. *Cf. In re G.P.*, 40 N.E.3d 989, 994–96 (Mass. 2015) ("Proof beyond a reasonable doubt of the likelihood of serious harm . . . is required before a person is committed for mental illness under [Mass.] G.L. ch. 123, §§ 7 and 8 . . . because a person can be subject to recommitment petitions and hearings indefinitely"). Because the clear-and-convincing standard is constitutionally compelled, *Addington*, 441 U.S. at 431-32, every state follows suit. *See, e.g.,* Ala. Code § 22-52-37 (requiring that the state

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[8] *See* National Council of State Legislatures, *Chart: Pretrial Release Eligibility*, https://tinyurl.com/tlcuazm (last visited 2/5/20) (tallying states).

show, by "clear, unequivocal, and convincing" evidence, the need to involuntarily confine a person with mental illness); Wyo. Stat. Ann. § 25-10-110.

Nor, whatever the circumstances under which an individual is initially committed, will our shared tradition of due process tolerate continued and prolonged civil detention without further process. In *Fasullo v. Arafeh*, 173 Conn. 473 (1977), the Connecticut Supreme Court "became the first high court to find a constitutional requirement of periodic review for civilly committed patients."[9] The *Fasullo* court's reasoning flowed naturally from the Supreme Court's holding in *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) requiring that "the nature and duration of commitment bear some reasonable relation to the purpose for which an individual is committed." Regardless of the initial justification, as civil detention wears on the government must once again bear the burden of justifying continued deprivation of liberty: "The burden must be placed on the state to prove the necessity of stripping the citizen of one of his most fundamental rights, and the risk of error must rest on the state." *Fasullo*, 173 Conn. at 481. *Fasullo*

[9] Note, *Procedural Safeguards for Periodic Review: A New Commitment to Mental Patients' Rights*, 88 Yale L. J. 850, 850 (1979).

heralded the "virtual demise of indeterminate involuntary institutionalization" among the states, and today "over forty states provid[e] a durational limit on commitment."[10] In Massachusetts, for instance, an initial order of civil commitment for mental illness is valid for only six months, after which the mental health facility must once again prove its case – at a mandatory hearing that is convened automatically, without the need for the detainee's request. Mass. Gen. Laws. c. 123, § 8(d).

The states' practices do not just show that our tradition of due process requires mandatory hearings at which the government must justify prolonged deprivations of individual liberty. They also show that due process' requirements are fundamentally reasonable: They are burdens that a government can bear, and still operate a cost-effective and efficient system that serves the public interest. The states have found a way to do it; the federal government must, too.

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[10] Michael L. Perlin, *Mental Disability Law: Civil and Criminal* tit. 1-2 §2C-6.5c (2d ed 2013).

II. Prolonged and Unnecessary Immigration Detention Pending Removal Proceedings Imposes Substantial Individual and Public Harms.

The government's practices here result in the prolonged detention of many residents of Amici States and many more across the country.

This detention has harsh and dramatic consequences for the detainees themselves; for their children and families; and for their communities and states.[11] Detention often means unemployment and severe short-term and long-term economic losses for detainees; a significantly-reduced likelihood of obtaining counsel and winning relief from removal; and harder-to-measure but still devastating costs like humiliation and violence. Families, deprived of wage-earners, must draw on public benefits; marriages and relationships are compromised and lost; and children, cut off from their parents, suffer both emotional distress and the loss of life opportunities. Meanwhile, states collect less

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[11] *See generally* Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. Rev. 1, 4 (2017) ("[The] individual bears the direct costs and inconvenience associated with detention. In addition, the detainee's family, employer, government, and the detention center bear societal costs."); Thomas Bak, *Pretrial Release Behavior of Defendants Whom the U. S. Attorney Wished to Detain*, 30 Am. J. Crim. L. 45, 65 (2002) ("The price to the defendant of pretrial incarceration is clearly his or her loss of freedom, loss of income from work which can no longer be performed…").

tax revenue and spend more on social benefits to support broken families.

Sometimes these high prices must be paid to prevent criminal conduct or flight. But the government should bear the burden of justifying the cost that prolonged immigration detention imposes on individuals and the states.

A. Prolonged and Unnecessary Immigration Detention Harms Detainees.

Detainees cannot work, and so they often lose their jobs.[12] The cost of unemployment is felt immediately, and its knock-on effects are long-lasting: Detention not only eliminates short-term jobs but also limits access to the job market. Even years after release, people released prior to legal proceedings are almost 25% more likely to have jobs than those who are detained. "Initial pretrial release," according to one quasi-experimental study, "increases the probability of employment

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[12] Albert W. Alschuler, *Preventative Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 Mich. L. Rev. 510, 517 (1986) ("The jobs of detained defendants frequently disappear, and friendships and family relationships are disrupted."). *And see, e.g.,* Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention* 28 (2011) (studying comparative impact of unnecessary detention around the world) ("In England and Wales, half of men and two-thirds of women employed at the time of arrest lost their jobs as a result of their pretrial detention.").

in the formal labor market three to four years after the bail hearing by 9.4 percentage points, a 24.9 percent increase from the detained defendant mean."[13] Fewer people who have been detained make any money at all after release – and those who do find work have significantly lower hourly wages and annual incomes.[14]

Unnecessary immigration detention's quantifiable harms to the detainee are not just collateral: The detention prejudices the detainee's prospects of success in the underlying case. Because they cannot earn money and because of communication barriers, detained immigrants struggle to find and retain counsel. One study found only 14% of detainees represented at removal hearings as against 66% of

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[13] Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Ec. Rev. 201, 204 (2018)

[14] Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 11-12 (2010), https://tinyurl.com/v7lbbvu (estimating the downstream lost wages and income of formerly-incarcerated people) ("Past incarceration reduced subsequent wages by 11 percent, cut annual employment by nine weeks, and reduced yearly earnings by 40 percent."); Dobbie et al., *supra* n. 13, at 227 ("Formal sector earnings are $948 higher per year over the same time period, a 16.1 percent increase from the mean, and the probability of having any income is 10.7 percentage points higher, a 23.2 percent increase from the mean.").

immigrants who were released from detention or never detained. [15] And immigrants represented by counsel are far more likely to win relief from removal – 10.5 times more likely, according to a study reported in 2015, and fully 11 times more likely according to 2017 data.[16]

Some of the direct harm to the detainee is harder to quantify but still economic: Housing is lost, for instance, and must be replaced.[17] Some is almost unquantifiable but excruciating, inflicting lifelong trauma: Immigration detainees can undergo rape, sexual abuse, and physical abuse in custody, sometimes at epidemic levels.[18] Inhumane living conditions, inadequate medical care, and pervasive staff

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[15] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32, 34-35 (2015).

[16] *Id.* at 9 ("In an empirical study of six years of removal cases, detainees with attorneys had their cases terminated or obtained immigration relief 21% of the time, fully ten-and-a-half times more than the 2% rate for those fighting their cases pro se."); Jennifer Stave et al., Vera Institute of Justice, *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity* 6 (Nov. 2017), https://tinyurl.com/r6pfsub ("48 percent of cases will end successfully for NYIFUP clients. This is a 1,100 percent increase from the observed 4 percent success rate for unrepresented cases.").

[17] Baughman, *supra* n. 11, at 5 (estimating loss of housing at 23%).

[18] *See, e.g.,* Alice Speri, *Detained, Then Violated*, The Intercept (Apr. 11, 2018), https://tinyurl.com/ybburtda (reporting on 1,224 complaints of sexual abuse in ICE custody over a seven year period).

disrespect inflict physical pain and emotional distress, humiliation, and anxiety.[19]

B. Prolonged and Unnecessary Immigration Detention Harms Children and Families.

Detained immigrants have spouses, children, and other close relatives who are U.S. citizens or permanent residents. Across the country, 4.1 million U.S. citizen children live with an undocumented parent; 5.9 million live with at least one undocumented family member; fully 17 million have at least one foreign-born parent[20]; and 1.2 million U.S. citizen adults are married to an undocumented immigrant.[21]

Prolonged detention can sever these relationships, whose strength and preservation are critical not just to detainees and their families but to the broader community. *See Obergefell v. Hodges,* 135 S. Ct. 2584,

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[19] *See, e.g.,* DHS Office of Inspector General*, Concerns about ICE Detainee Treatment and Care at Detention Facilities* (Dec. 2017) (revealing "problems that undermine the protection of detainees' rights, their humane treatment, and the provision of a safe and healthy environment."); California Department of Justice, *Immigration Detention in California* (Feb. 2019), https://tinyurl.com/w7m4rb7 (discussing findings including "delayed or inadequate medical care" and "inadequate mental health staffing and services.").

[20] American Immigration Council, *U.S. Citizen Children Impacted by Immigration Enforcement* (Nov. 2019), https://tinyurl.com/y8nntehd.

[21] Migration Policy Institute, *Profile of the Unauthorized Population: United States*, https://tinyurl.com/sygcwmv (last visited Feb. 19, 2020).

2594 (2015) ("'The first bond of society is marriage; next, children; and then the family.'") (quoting Cicero). Physical distance, communication barriers, and the stress of absence "places strain on marriages and serious romantic relationships."[22] The strain stretches relationships to the breaking point: "Incarcerated men who are married are about three times more likely to have their marriages fail than those who are not incarcerated, with the probability of divorce increasing with time served."[23] Absent sources of emotional and financial support, families suffer both psychological and economic distress. As "household incomes drop[] precipitously," families struggle to pay the bills, lose their housing, and go without food.[24]

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[22] National Healthy Marriage Resource Center, *Incarceration and Family Relationships: A Fact Sheet* (2010), https://tinyurl.com/zesa5ks. Even in the relatively compact Northeast, immigrants can be detained at great distances from their families. For instance: As noted *supra* n. 7, immigrant Connecticut residents are detained out of state – most frequently at the Bristol County Jail in North Dartmouth, MA. The jail is an average driving distance of 134 miles from Connecticut's six largest cities.

[23] *Id.*

[24] Ajay Chaudry et al., The Urban Institute, *Facing Our Future: Children in the Aftermath of Immigration Enforcement* 28-33 (Feb. 2010), https://tinyurl.com/tje4ylm.

It is the hardest for children. Separated from their parents, children are more likely to struggle in school academically and behaviorally, and more likely to drop out.[25] As they develop antisocial behaviors, they are more likely to engage in criminal activity and to be arrested.[26] With family relationships fraying, children of detainees may even fall into the abuse and neglect system and be placed in foster care.[27] They can face serious lifelong health consequences, since detention of a parent is an "adverse childhood experience" that comes with increased risk for depression, suicide attempts, sexually

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[25] *See* Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention* 29 (2011) ("A review of the literature on children whose mothers are detained found that those children's lives are greatly disrupted… resulting in heightened rates of school failure and eventual criminal activity."); Susan D. Phillips et al., *Children in Harm's Way: Criminal Justice, Immigration Enforcement, and Child Welfare* 67 (Jan. 2013), https://tinyurl.com/rlq5tbn (reviewing studies showing "increased behavioral problems in schools and increased need for mental health services" and "negative educational and mental health outcomes.").

[26] Baughman, *supra* n. 11, at 7.

[27] Phillips et al., *supra* n. 25, at 22.

transmitted diseases, smoking, and alcoholism.[28] The stress and anxiety can even cause diminished cognitive functioning.[29]

C. Prolonged and Unnecessary Immigration Detention Harms States' Economic and Social Interests.

Some of the individual and family costs arising from unnecessary and prolonged immigration detention are passed along and ultimately paid by the states.[30] The states, in fact, are doubly burdened here: Their revenues drop because of reduced economic contributions and tax payments by detained immigrants, and their expenses rise because of

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[28] Shanta R. Dube et al., *The Impact of Adverse Childhood Experiences on Health Problems: Evidence from Four Birth Cohorts Dating Back to 1900*, 37 J. Preventative Medicine 268, 274-75 (2003).

[29] Jennifer H. Suor et al., *Tracing Differential Pathways of Risk: Associations Among Family Adversity, Cortisol, and Cognitive Functioning in Childhood,* Child Development, Vol. 86, 1142-58 (2015).

[30] Of course, the states get their money from state taxpayers, who are also being taxed by the federal government for the costs of unnecessary detention. In federal fiscal year 2018, the federal government – funded by, *inter alia*, the residents of the Amici States – spent an average of $208 per day to detain each immigrant. Laurence Benenson, National Immigration Forum, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply* (May 9, 2018), https://tinyurl.com/yc8dobng. A 2017 study estimated that the federal government would save $1.4 billion annually by releasing more low-risk detainees pending removal hearings. Michael D. Nicholson, Center for American Progress, *The Facts on Immigration Today* (Apr. 20, 2017), https://tinyurl.com/yczunwsg.

increased social welfare payments in response to the harms caused by unnecessary and prolonged detention.

Immigrants drive state economies and contribute directly to the state fisc. More than 7 million undocumented immigrants across the country are employed.[31] When they are at liberty and working, undocumented residents pay state and local taxes – more than $11.7 billion worth each year.[32] They pay federal taxes too: Undocumented workers contributed $13 billion to the Social Security Trust Fund in 2013,[33] and taxpayers without social security numbers paid $23.6 billion in income taxes in 2015.[34] In Connecticut alone, immigrants earn $23.5 billion and spend $16.1 billion annually; employ 95,177 people;

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[31] Migration Policy Institute, *supra* n. 21.

[32] Lisa C. Gee et al., *Undocumented Immigrants' State & Local Tax Contributions*, Institute on Taxation and Economic Policy (Mar. 2017), https://tinyurl.com/utzgeel.

[33] Steven Goss et al., Social Security Administration, *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds* (2013), https://tinyurl.com/zg634jy.

[34] Alexia Fernández Campbell, *Trump Says Undocumented Immigrants Are an Economic Burden. They Pay Billions in Taxes*, VOX (Oct. 25, 2018), https://tinyurl.com/y5o5ec8l.

comprise 23.4% of the science, technology, education and math workforce; and pay $7.4 billion in state and local taxes.[35]

But when they are in immigration custody, detainees neither make money nor pay taxes – and as their economic prospects diminish post-release, so do their tax payments. Indeed, they may stop paying taxes entirely, even for years after release, as a result of their detention.[36]

Unnecessary detention leaves states needing to buy more services with their diminished resources. Foster care for children of detained parents can cost states $26,000 per year for each child.[37] Each child who drops out of school after the trauma of a parent's detention will have a long-term costs to society of about $260,000.[38] Families who lose a wage-

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[35] New American Economy, *Immigrants and the Economy in Connecticut*, https://tinyurl.com/t72bezt.

[36] Dobbie et al., *supra* n. 13, at 204 (finding that defendants granted pretrial release were 16.7 percent more likely to file a tax return as compared to those who were detained).

[37] Nicholas Zill, National Council For Adoption, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption* 3 (May 2011), https://tinyurl.com/rs4ewv6.

[38] Jason Amos, Alliance for Excellent Education, *Dropouts, Diplomas, and Dollars: U.S. High Schools and the Nation's Economy* 2 (2008), https://perma.cc/2PYW-64FY.

earner and require public benefits will require new welfare spending.[39] And detention, because it cuts job market ties and loosens social cohesion, can contribute to future offending, imposing on society the costs of crime, enforcement, and prosecution.[40]

CONCLUSION

Because due process requires substantial procedural protections before the government can impose the high costs that come with prolonged immigration detention, the Amici States respectfully ask this Honorable Court to order that immigrant detainees be provided with protections consistent with those sought by petitioners.

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[39] *See* Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719, 1763 (2002) ("During pretrial incarceration, detainees' loss of freedom results in many losing jobs and homes. Taxpayers are left to pay the rising costs of detention, while absorbing the social and financial impact of newly dislocated family members.").

[40] *See* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 715 (2017).

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I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that it contains 4,568 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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Dated: February 19, 2020

CERTIFICATION OF SERVICE

I hereby certify that on this 19th day of February, 2020, I caused the foregoing brief to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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