

Nos. : 19-1787, 19-1900

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 Appeal from the United States District Court for the District of Massachusetts
The Honorable Patti B. Saris (Case No. 3:13-cv-30125-PBS)

BRIEF OF AMICI CURIE

Boston College Immigration Clinic, Boston University School of Law, Immigrants' Rights and Human Trafficking Program, Detention Watch Network, Families for Freedom, Greater Boston Legal Services, Harvard Law School Crimmigration Clinic, Immigrant Defense Project, Immigrant Legal Resource Center, Lawyers for Civil Rights, National Immigration Project of the National Lawyers Guild, Suffolk University Law School Immigration Clinic

**IN SUPPORT OF PETITIONERS–APPELLANTS/CROSS-APPELLEES
AND IN SUPPORT OF PARTIAL REVERSAL**

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), *amici curiae* state that no publicly held corporation owns 10% or more of the stock of any of the parties listed herein, which are nonprofit organizations and community groups.

Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* state that no counsel for the party authored any part of the brief, and no person or entity other than amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief.

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STATEMENT OF INTEREST

Amici curiae, Boston College Immigration Clinic, Boston University School of Law, Immigrants' Rights and Human Trafficking Program, Detention Watch Network, Families for Freedom, Greater Boston Legal Services, Harvard Law School Crimmigration Clinic, Immigrant Defense Project, Immigrant Legal Resource Center, Lawyers for Civil Rights, National Immigration Project of the National Lawyers Guild, Suffolk University Law School Immigration Clinic, are immigrant rights organizations, community groups, law clinics, and legal service providers whose members and clients face the severe consequences of prolonged civil immigration imprisonment.¹ Their members and clients are locked away in jails and prisons, subject to abusive conditions and separated from their families in settings indistinguishable from criminal punishment. Although other contexts of confinement, including criminal confinement without jury trial and nearly every form of civil confinement, are marked by a six-month limitation or review, the Government takes the position that mandatory immigration imprisonment is distinguishable from such settings. It further claims that immigration imprisonment may remain constitutionally reasonable for much longer periods of time before

¹ *Amici curiae* submit this brief pursuant to Fed. R. App. P. 29(a)(2). Counsel for both Petitioners-Appellants and Respondents-Appellees have consented to the filing of this brief.

intervention is required, and that individual habeas litigation is a sufficient means to check unreasonably prolonged confinement.

The Government's position in this case, upon which the District Court below partially relied, is built upon a foundation of legal fictions that bear no resemblance to the lived experience of immigrants imprisoned in the U.S. Immigrants experience prolonged imprisonment as punishment. The barriers to pursuing individual habeas litigation are often insurmountable. And even when those barriers are overcome, it takes months or longer for federal courts to resolve habeas cases, furthering prolonging the harm that this remedy is meant to address.

The stories of the *Amici's* clients and members illustrate these truths. Under the Government's position, most people will be forced to remain in punitive confinement, for as long as federal immigration officials chose to imprison them, without review. *Amici curiae* thus have a profound interest in ensuring that the voices of their members and clients are included in the consideration and resolution of the legal issues in this case.

SUMMARY OF ARGUMENT

“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty” that the Due Process Clause protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). In the “special and narrow non-punitive circumstances” of immigration detention, due process requires

“a special justification . . . [that] outweighs the individual’s constitutionally protected interest in avoiding physical restraint.” *Id.* (internal quotation marks omitted) (internal citations omitted). Under Supreme Court precedent, only flight risk and dangerousness may justify civil immigration imprisonment. *Id.*

In *Demore v. Kim*, the Supreme Court upheld the “brief” mandatory detention of an individual who was promptly detained following his release from prison and conceded removability on the basis of those criminal offenses. 538 U.S. 510, 513 (2003); *id.* at 529 (relying on Government data to conclude that deportation cases took on average a month-and-a-half to adjudicate in immigration court, and five-and-a-half months including administrative appeal). In *Demore* and a subsequent case, *Jennings v. Rodriguez*, the Supreme Court left open the question of whether and when prolonged detention violates the Constitution. *See Demore*, 538 U.S. at 532 (Kennedy, J., concurring); *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018). Over the last decade, every circuit court to address the question, including this Court, has concluded that prolonged immigration imprisonment raises serious constitutional concerns. *See Reid v. Donelan (Reid IV)*, 819 F.3d 486, 494 (1st Cir. 2016), *withdrawn*, No. 14-1270, 2018 WL 4000993 (1st Cir. May 11, 2018); *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015), *vacated*, 138 S. Ct. 1260 (2018); *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 477-78 (3d Cir. 2015), *abrogated in part by Jennings*, 138 S. Ct. 830 (2018); *Rodriguez v. Robbins*, 715

F.3d 1127, 1138 (9th Cir. 2013), *abrogated in part by* Jennings, 138 S. Ct. 830 (2018); *Sopo v. Atty. Gen.*, 825 F.3d 1199, 1217-18 (11th Cir. 2016), *vacated*, 890 F.3d 952 (11th Cir. 2018); *Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir. 2003), *abrogated in part by* Jennings, 138 S. Ct. 830 (2018).

This case presents several important questions, including when or under what circumstances immigration imprisonment becomes unconstitutionally prolonged, and whether individual habeas litigation provides a meaningful remedy for that constitutional violation. *Amici* support the position of Petitioners that an individualized hearing must be held at six months and that an individual need not rely on ad-hoc habeas litigation to receive such a hearing.

Review of custody at six months is the constitutional norm for civil confinement. Pet'r Br. 33-38. Even in the criminal context, the Supreme Court has repeatedly set six months as the limit on confinement for criminal offenses that courts can impose without a jury trial. *Id.* 34. The District Court below, and the Government in advocating for a different rule, take the position that immigration imprisonment is "materially different" from criminal confinement, justifying a lesser set of protections. Pet'r Br. App. 25.

Nothing could be further than the truth from the perspective of the roughly 50,000 people locked up across more than 200 immigration jails and prisons every

day.² Twenty-five percent of these facilities are county jails, designed for punishment, and an additional sixty percent are run by notorious private prison corporations, known for forced labor and physical and sexual abuse.³ Inside these jails and prisons, people wear prison jumpsuits, remain shackled during visitation and court appearances, endure strip searches and 24-hour surveillance, and are referred to by numbers.⁴ Access to the things we take for granted—movement, fresh

² Immigration and Customs Enforcement FY2019 Enforcement and Removal Operations Report at 5, <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>; U.S. DEP'T OF HOMELAND SEC., HOMELAND SEC. ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 6 (2016), <https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf> (hereinafter “HSAC Report”).

³ Monsy Alvarado et al., *Deaths in custody. Sexual violence. Hunger Strikes. What we uncovered inside ICE facilities across the US*, USA TODAY (Dec. 22, 2019), <https://www.usatoday.com/in-dpth/news/nation/2019/12/19/ice-asylum-under-trump-exclusive-look-us-immigration-detention/4381404002>. See also HSAC Report, *supra*.

⁴ See, e.g., AMNESTY INT’L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 37-39 (2009), <http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf>; NAT’L IMMIGRANT JUSTICE CENTER & PHYSICIANS FOR HUMAN RIGHTS, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION 10-11 (2012), <http://static.prisonpolicy.org/scans/Invisible.pdf> (hereinafter “NIJC/PHR Report”); HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW 7-10 (2011), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf>.

air, and even human touch—is restricted or denied altogether.⁵ Families bear the emotional and financial brunt of months and years of separation from their loved ones.⁶

For many individuals trapped in these punitive conditions, the uncertainty as to the length of their confinement only adds to the cruelty. The backlog in immigration courts currently stands at more than one million cases, a number that has quadrupled over the past decade.⁷ In 2019, the average wait time for a pending case was nearly 700 days.⁸ Today’s system of immigration imprisonment operates

⁵ Visitation, including “contact visits,” is highly restricted in immigration detention. *See, e.g.*, N.Y. UNIV. SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC, ET AL., LOCKED UP BUT NOT FORGOTTEN: OPENING ACCESS TO FAMILY & COMMUNITY IN THE IMMIGRATION DETENTION SYSTEM 9-12 (2010), <https://www.afsc.org/sites/afsc.civicaactions.net/files/documents/LockedUpFINAL.pdf>. Some facilities only permit visitation through video, and several facilities have limited or no access to outdoor recreation. *See, e.g.*, DET. WATCH NETWORK, EXECUTIVE SUMMARY: EXPOSE AND CLOSE 3 (2012), <http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Executive%20Summary.pdf>.

⁶ American Immigration Council, *U.S. Citizen Children Impacted by Immigration Enforcement* (Nov. 22, 2019), <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement> (hereinafter “AIC Report”).

⁷ Transactional Records Access Clearinghouse, Syracuse Univ., *Immigration Court Backlog Tool*, http://trac.syr.edu/phptools/immigration/court_backlog/; Transactional Records Access Clearinghouse, Syracuse Univ., *Average Time Pending Cases Have Been Waiting in Immigration Courts*, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php.

⁸ *Id.*

on a penal model, is experienced by immigrants as punishment, and causes grave deprivations of liberty for immigrants trapped for months and years.⁹

As explained below, the real-life circumstances of immigrants in immigration jails and prisons is indistinguishable from those facing or serving time for criminal charges. *See* Point I. Moreover, the District Court’s adoption of the Government’s preferred vehicle for addressing these concerns—ad hoc individual habeas litigation that merely presumes that detention has become unconstitutionally prolonged after a full year—is also flawed. Habeas litigation is far too inaccessible and ineffectual a remedy to prevent the majority of prolonged immigration imprisonment. *See* Point II. Only automatic hearings at six months will ensure that all people, not just those fortuitous enough to have a lawyer or the ability to seek federal court intervention pro se, will have meaningful protection from prolonged immigration imprisonment.

⁹ Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL L. REV. 999, 1024-25 (2017) (citing survey of 565 noncitizens detained for a continuous period of six months or more, in which 47% of the detainees stated that immigration detention was worse than prison/jail).

ARGUMENT

I. **A “Cemetery of Living Men”: Prolonged Immigration Imprisonment is Materially Indistinguishable From Other Forms of Incarceration, Resulting in Grave Deprivations of Liberty Characterized by Punitive, Abusive, and Coercive Conditions.**

Following the suicide death of **Roylan Hernandez-Diaz**, who reportedly became despondent after five months of imprisonment awaiting his immigration court hearing at Richwood Correctional Center in Louisiana, a group of twenty other immigrants confined at the facility wrote “Justice for Roylan” on their shirts, entered the cafeteria, and refused to eat.¹⁰ In response, guards beat the men, with one beaten so badly he was hospitalized. **Vicente Raul Orozco Serguera**, one of the immigrants who participated in the solidarity action, wrote about the incident and the men’s experience in immigration imprisonment:

The United States has appointed itself the country of liberty, the land of opportunity, the defender of human rights and the refuge for people oppressed by their governments. All that ends once you’re detained. . . . We want our freedom to fight our cases freely and leave this hell, for Louisiana is a ‘Cemetery of living men.’¹¹

Too many experience immigration imprisonment as a “cemetery of living men”—a place where a one’s life wastes away, with no date certain as to when one’s

¹⁰ Monsy Alvarado et al., *Deaths in custody. Sexual violence. Hunger Strikes. What we uncovered inside ICE facilities across the US*, USA TODAY (Dec. 22, 2019), <https://www.usatoday.com/in-dpth/news/nation/2019/12/19/ice-asylum-under-trump-exclusive-look-us-immigration-detention/4381404002>.

¹¹ *Id.*

fate and freedom will be decided, isolated from family and community in the United States. It is punishment, the equivalent of an indeterminant criminal sentence, but without even meager attempts to provide “rehabilitation” or “reentry” services. As detailed below, all the worst features of incarceration run rampant in immigration jails and prisons: solitary confinement; medical neglect; physical, emotional, and sexual abuse; forced labor; and family separation. To describe immigration imprisonment as anything less than punitive is pure legal fiction, and devalues the liberty interests of those subject to such imprisonment in automatic review of their confinement.

1. Solitary confinement

There is perhaps no starker example of how immigration imprisonment has become a tool to punish and control than the prevalence of solitary confinement—a “terror and peculiar mark of infamy.” *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (quoting *In re Medley*, 134 U.S. 160, 170 (1890)).¹² A person held in solitary confinement is locked in a cell for 23 hours a day, receives

¹² Peter S. Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 502 (2006) (noting that “[a] long list of possible symptoms from insomnia and confusion to hallucinations and outright insanity has been documented” among people subjected to solitary confinement); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325 (2006) (noting that anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors are all associated with solitary confinement).

meals through a narrow slot in a sealed door, and is barred from phone calls or visits from family members or other loved ones. It is one of the most extreme punishments a person may experience. Yet solitary confinement is a punishment routinely used in immigration jails and prisons.¹³

Consider the story of *Reid* class member **Mayobanex Suarez**.¹⁴ Mr. Suarez is a longtime lawful permanent resident and the loving fiancée and father to his U.S. citizen family. At the age of fourteen, Mr. Suarez was diagnosed with bipolar disorder, which he was able to manage through medication and treatment. In 2018, he was convicted of possession of pistol without a license, his sole criminal conviction. After being paroled early for the offense in 2019, Mr. Suarez was transferred into immigration custody and imprisoned at Bristol County House of Corrections in Massachusetts. Jail officials refused to provide him with medication for his bipolar disorder, leading to mood swings and hallucinations. Instead, he was placed in solitary confinement after guards alleged he had caused a disturbance, where he stayed for 20 days in isolation. Writing of his experience, Mr. Suarez states:

¹³ NIJC/PHR Report, *supra*, at 17-20; PHYSICIANS FOR HUMAN RIGHTS, BURIED ALIVE: SOLITARY CONFINEMENT IN THE U.S. DETENTION SYSTEM 11-14 (2013), https://s3.amazonaws.com/PHR_Reports/Solitary-Confinement-April-2013-full.pdf.

¹⁴ See Declaration of Mayobanex Suarez (hereinafter “Suarez Decl.”), on file with counsel.

Being alone for 23 hours a day further worsened the symptoms of my mental illness. The only person you can talk to is the wall. Alone for so long, my hallucinations grew stronger. I was not able to move freely around the facility, which limited my ability to attempt to gain control over my mind through showering or other physical means. My experience in detention has been horrible. It is hard to sleep, and it feels like trying to get help will just get me sent back to segregation. The lack of activity or programs makes me feel like I am going crazy sometimes. Being detained like this feels worse than being in prison.¹⁵

Although Mr. Suarez was granted cancellation of removal by an Immigration Judge in May 2019, the Government appealed and kept Mr. Suarez in immigration jail. After the Board of Immigration Appeals overturned the Immigration Judge's decision, the Government deported Mr. Suarez to the Dominican Republic in December 2019. He had been imprisoned by immigration officials for nearly a year. His petition for review of the Board's decision is still pending.

Allegations of "disturbances" are not the only circumstances in which individuals in jail end up in solitary confinement. To the contrary, solitary confinement is the first response to an infraction of any number of mundane rules that exist only in jails and prisons.¹⁶

¹⁵ *Id.*

¹⁶ N.J. ADVOCATES FOR IMMIGRANT DETAINEES, ET AL., ISOLATED IN ESSEX: PUNISHING IMMIGRANTS THROUGH SOLITARY CONFINEMENT 5-6 (2016), https://www.afsc.org/sites/afsc.civicaactions.net/files/documents/Isolated%20in%20Essex%20Full%20Report%202016_1.pdf (hereinafter "NJAID Isolated in Essex Report"); N.J. ADVOCATES FOR IMMIGRANT DETAINEES, ET AL., 23 HOURS IN THE BOX: SOLITARY CONFINEMENT IN NEW JERSEY IMMIGRATION DETENTION 17, 28-30 (2015),

Astrid Morataya is a longtime lawful permanent resident and mother of three U.S. citizen children.¹⁷ Prior to being placed in removal proceedings, Ms. Morataya endured years of sexual abuse, including a violent kidnapping and rape. During those years of abuse, she was convicted for a low-level drug distribution conviction and was sentenced to probation. Fourteen years later, she was placed in removal proceedings on the basis of that conviction and imprisoned by immigration officials, transferring her to two different county jails across two states. Ms. Morataya was twice placed in solitary confinement—once for having a sugar packet in her uniform without permission, and once for not being ready to leave her cell while trying to secure menstrual pads during her period. Solitary confinement was a constant threat over the two-and-a-half years Ms. Morataya spent in immigration jail before finally receiving a U visa, a protection from deportation for certain crime victims. Now free and reunited with her children, Ms. Morataya is still recovering from the shame of the indignities she suffered in immigration jail.

https://www.afsc.org/sites/default/files/documents/23%20Hours%20in%20the%20Box_2.pdf.

¹⁷ The facts of Ms. Morataya's case are detailed in a declaration by her attorney. *See* Decl. of Claudia Valenzuela, Esq. of the National Immigrant Justice Center (on file with counsel).

Mr. Suarez's and Ms. Morataya's experiences are not outliers. On any given day, approximately 300 immigrants are held in solitary confinement at the 50 largest immigration detention facilities.¹⁸ Half of these individuals were isolated for more than two weeks; one in nine individuals was isolated for more than two months.¹⁹ A study of one 900-bed immigration jail alone showed that solitary confinement was used against immigrants in detention 428 times in just a two-year period.²⁰ It is regular feature of punitive imprisonment, and negates any assumption that immigration imprisonment is not punishment.

2. Medical neglect

Like **Mr. Suarez** in the example above, immigrants in confinement are all too often denied adequate medical care. When Mr. Suarez was released on parole from the conviction triggering his removal proceedings, the parole board specified a plan for treatment for Mr. Suarez's bipolar disorder.²¹ Immigration officials at Bristol County House of Corrections ignored this mandate.²² His was not an isolated case. The Massachusetts Attorney General's Office announced an investigation into

¹⁸ Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 23, 2013), <http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html>.

¹⁹ *Id.*

²⁰ NJAID Isolated in Essex Report, *supra*, at 5-6.

²¹ Suarez Decl., *supra*.

²² *Id.*

“harsh or unhealthy” conditions at Bristol County House of Corrections after a report revealed that the jail accounted for a quarter of all jail suicides in the state.²³

The case of *Reid* class member **Jihad Georges** further highlights the severe medical neglect that comes with prolonged immigration confinement.²⁴ Mr. Georges came to the United States in 2001 to escape violence and danger in Lebanon. After settling in the United States, he worked as a mechanic, became active in his local church, married his U.S. citizen wife, and received his green card in 2008. Upon release from his sole criminal conviction in June 2017, he was transferred directly to ICE custody. When ICE was transporting Mr. Georges from Bristol County House of Corrections to immigration court, excessive speed led the driver to crash. Mr. Georges was severely injured in the accident, resulting in a brain hemorrhage, a broken spine, and a broken knee. After spending two months in the hospital, ICE took Mr. Georges back into custody, this time at Suffolk County House of Corrections, where he remained until receiving a *Reid* bond hearing.

²³ Jenifer McKim and Shaz Sajadi, *Behind the Wall: Suicides Mount in Massachusetts County Jails*, NEW ENGLAND CTR. FOR INVESTIGATIVE REPORTING (May 6, 2017) <https://www.necir.org/2017/05/06/behind-the-wall-suicides-mount-in-massachusetts-county-jails/>; Jenifer McKim, *AG Wants Investigation of Bristol Sheriff*, NEW ENGLAND CTR. FOR INVESTIGATIVE REPORTING (June 22, 2018) <https://www.necir.org/2018/06/20/ag-wants-investigation-of-bristol-sheriff/>.

²⁴ See Declaration of Jihad Georges (hereinafter “Georges Decl.”), on file with counsel.

While imprisoned at Suffolk, Mr. Georges suffered severely from a lack of adequate treatment. As Mr. Georges has written:

Being detained in ICE custody, especially after the accident was extremely difficult for me. I do not feel that I got the full treatment that I needed while staying in the jail clinic. I[t] was challenging to recover while being incarcerated. Furthermore, the jail was very cold, which made my recovery harder.²⁵

Mr. Georges was eventually released after approximately 11 months of imprisonment. But the accident and lack of adequate treatment left Mr. Georges disabled and unable to work.²⁶

The recent re-opening of Wyatt Detention Center, a private prison in Rhode Island where several *Reid* class members have been transferred, raises similar red flags. ICE had previously ended its contract with the facility following the 2009 death of **Hiu Lui “Jason” Ng**. Mr. Ng, an immigrant who had been ordered deported in absentia but had a pending visa application, was taken into custody at his greencard interview and eventually detained at Wyatt.²⁷ After he began experiencing severe back pain, he begged for medical treatment from the prison medical staff. Immigration officials accused him of faking the condition, denying

²⁵ *Id.*

²⁶ *Id.*

²⁷ Nina Bernstein, *Ill and in Pain, Detainee Dies in U.S. Hands*, N.Y. TIMES (Aug. 12, 2008), <https://www.nytimes.com/2008/08/13/nyregion/13detain.html>; Complaint at 17-19, 23, *Qu v. Central Falls Detention Facility Corp.*, No. 09-53-S (D.R.I. Feb. 9, 2009), ECF No. 1.

him a wheelchair and an independent medical evaluation even after he could no longer walk or stand, and instead shackled and transported him to a federal facility in Connecticut, where he was pressured to give up his case—an incident his attorney described as “torture” in light of his painful condition. Family members repeatedly contacted prison officials seeking care for Mr. Ng but were brushed aside.²⁸

A federal judge eventually ordered the Government to provide Mr. Ng with an independent medical evaluation, which confirmed that he had terminal cancer and a fractured spine. After roughly over a year of being detained, Mr. Ng was admitted to the hospital under guard, while his wife and sons—aged three and one at the time—and other relatives had to wait for approval from the warden for three days before visiting him on his death bed. His family knew how terrified he was being sent back to Wyatt. The New York Times reported his sister’s last words to Mr. Ng before he died in the hospital:

Brother, don’t worry, don’t be afraid. They are not going to send you back to the facility again. Brother, you are free now.

In the wake of the investigation into his death, ICE ended its contract with Wyatt in 2009, only to renew last year. At a peaceful gathering organized by Never Again

²⁸ *Id.*

Action to protest the reopening of the facility in 2019, a Wyatt corrections officer drove his car into the crowd.²⁹

The experiences of Mr. Suarez, Mr. Georges, and Mr. Ng are far too common. Immigrants are routinely subject to substandard medical care, sometimes with fatal results like with what happened to Mr. Ng.³⁰ Since 2003, there have been 194 reported deaths in ICE custody.³¹ A study of recent detention deaths concluded that half were due to inadequate medical care.³²

3. Physical, emotional, and sexual abuse.

In Bristol County House of Corrections, a guard repeatedly taunted an immigrant as a “baboon” and “gorilla” and derided his attempts to file complaints,

²⁹ Tim Elfrink, *A Truck Drove Into ICE Protesters Outside a Private Prison. A Guard Was at the Wheel*, WASH. POST (Aug. 15, 2019, 11:22 A.M.) <https://www.washingtonpost.com/nation/2019/08/15/video-ice-protesters-hit-truck-guard-rhode-island-wyatt/>.

³⁰ See, e.g., HUMAN RIGHTS WATCH, ET AL., CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION (2018), https://www.hrw.org/sites/default/files/report_pdf/us0618_immigration_web2.pdf;

³¹ *The Death Toll in ICE Custody Rises to 194, Groups Demand an Immediate Investigation*, DETENTION WATCH NETWORK (July 25, 2019) <https://www.detentionwatchnetwork.org/pressroom/releases/2019/death-toll-ice-custody-rises-194-groups-demand-immediate-investigation>.

³² CODE RED, *supra*; Meera Senthilingam, *Half of recent immigrant detainee deaths due to inadequate medical care, report finds*, CNN (Jun. 20, 2018), <https://www.cnn.com/2018/06/20/health/immigrant-detainee-deaths-medical-care-bn/index.html>.

telling him to “rattle his cage.”³³ The incident was one of 800 documented reports of abuse motivated by hate or bias in just 34 immigration jails and prisons over a year-and-a-half period beginning in January 2017.³⁴

Gretta Soto Moreno,³⁵ a transgender asylum seeker, was the victim of sexual assault and years of beatings and threats before fleeing to the United States. She was imprisoned here awaiting her asylum case for nearly three years, two of which were spent in an all-men’s unit in Eloy Detention Center in Arizona. She was subjected to strip searches by guards who touched her inappropriately and made demeaning comments. She filed repeated grievances, to little result. After two years of daily abuse, ICE transferred her to a segregated unit for LGBT detainees. The abuse continued. Guards told her and other asylum-seekers to “act male” and use their “male voices.” As Ms. Soto Moreno states:

I was losing my mind. I was verbally attacked by officers and detainees all the time. They even used a flashlight [to check my body cavities]. They drill it so much in our brains that when we’re outside, we’re still afraid of people.

³³ FREEDOM FOR IMMIGRANTS, PERSECUTED IN U.S. IMMIGRATION DETENTION: A NATIONAL REPORT ON ABUSE MOTIVATED BY HATE (Jun. 25, 2018), <https://www.freedomforimmigrants.org/report-on-hate>.

³⁴ *Id.*

³⁵ The facts of Ms. Soto Moreno’s case are detailed in Brief for Appellant at 3-6, *Moreno v. Lynch*, 624 F. App’x 531 (9th Cir. 2015) (No. 14-72395). *See also* Tizinia Rinaldi, *She Fled Abuse in Mexico, and Now This Trans Woman Says She Was Abused in Immigration Detention Too*, PUB. RADIO INT’L’S THE WORLD (Apr. 14, 2016), <https://www.pri.org/stories/2016-04-14/after-almost-three-years-immigration-detention-and-abuse-transgender-woman-looks>.

These harms are felt by many of the most vulnerable immigrants, forced to await their fates in jail and prisons. A December 2019 *USA Today* investigation found over 400 allegations of sexual assault or abuse, more than 800 instances of physical force against detainees, nearly 20,000 grievances filed by detainees, and at least 29 deaths, including seven suicides, since January 2017.³⁶

4. Forced labor

Many private prisons and county jails depend on the labor of detained noncitizens to maintain their facilities. These detained noncitizens often work at no pay or for a mere \$1 per day.³⁷ Consider the story of **Pedro Guzmán**, who came to the United States when he was eight years old.³⁸ In 2009, his family was thrown

³⁶ See Alvarado, *supra*. See also SOUTHERN POVERTY LAW CENTER, ET AL., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH 14-16 (2016), https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf; HUMAN RIGHTS WATCH, DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION 8-14 (2010), <https://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf>.

³⁷ Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. TIMES (May 24, 2014), <https://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html>.

³⁸ See *id.*; Elise Foley, *Immigrant Freed From 19-Month Detention: 'I Treat My Dogs Much Better Than The Detainees Are Treated'*, HUFFINGTON POST (May 18, 2011), http://www.huffingtonpost.com/2011/05/18/immigrant-freed-from-detention_n_863893.html; Richard Fausset, *Could He be a Good American?*, L.A. TIMES (June 4, 2011), <http://www.latimes.com/nation/la-na-deportation-story-htmlstory.html>; Kelsey Sheehy, *Saga Highlights Kinks in Immigrant Detention System*, SAN DIEGO TRIB. (Apr. 23, 2011), <http://www.sandiegouniontribune.com/sdut-saga-highlights-kinks-in-immigrant-detention-2011apr23-story.html>.

into upheaval when an immigration judge ordered him removed in absentia after officers mistakenly sent the court notice to the wrong address. Later that year, while Mr. Guzmán was loading his car with donation bags to take to Goodwill, ICE officers arrested him, handcuffing him in front of his U.S. citizen wife and three-year-old son. An immigration judge subsequently found that Mr. Guzmán's two misdemeanor marijuana convictions as a teenager consigned him to mandatory detention.

Mr. Guzmán was detained in Stewart Detention Center in Georgia, a private prison operated by the Corrections Corporation of America ("CCA"), now known as CoreCivic. At Stewart, Mr. Guzmán was put to work in the kitchen, where his shift began every morning at 2 A.M. If he was late, the guards threatened him with solitary confinement. At one point, he was forced to work when sick with a fever. For this and his other work cleaning communal areas, painting walls, and processing paperwork, he was paid \$1 a day. All of Mr. Guzmán's earnings went straight back into the coffers of CCA, since he had no choice but to purchase food, basic hygiene products, and phone cards to call his family from the CCA-run commissary. This lasted for a year and a half, until Mr. Guzmán was released when he was granted cancellation of removal.

Mr. Guzman is not alone. There are at least six lawsuits pending against GEO Group and CoreCivic across the country, alleging the forced labor of thousands of

immigrants imprisoned in their facilities.³⁹ These facilities defend their actions by pointing rules and policies from the prison labor context—thus relying on the very context they seek to distinguish themselves from now.

5. Family Separation

Isolation from family is another key feature linking both immigration and criminal confinement. **Arnold Giammarco** has experienced the hardship of family separation during his lengthy period of confinement in Bristol County Jail.⁴⁰ An honorably discharged veteran of the U.S. Army and Connecticut National Guard, Mr. Giammarco lived in the United States for fifty years before federal immigration agents decided to detain him. Although Mr. Giammarco had applied for citizenship when he was serving in the military, no action had been taken on his application. After he left military service, he suffered emotional difficulties leading to drug addiction and ended up with criminal convictions for drug possession and petty theft.

³⁹ See, e.g., Kieran Nicholson, *Immigrants can sue federal detention center in Colorado over forced labor, appeals court says*, Denver Post (Feb. 8, 2018), <https://www.denverpost.com/2018/02/09/geo-group-aurora-immigration-detention-center-lawsuit/>; Esther Yu His Lee, *New lawsuit finds detained immigrants are forced to work for \$1 a day*, ThinkProgress (Apr. 17, 2018), <https://thinkprogress.org/stewart-immigrant-forced-labor-9e3c73a88932/>.

⁴⁰ The facts of Mr. Giammarco's story are detailed in Complaint, *Giammarco v. Beers*, No. 3:13-cv-01670-VLB (D. Conn. Nov. 12, 2013), https://www.law.yale.edu/system/files/documents/pdf/Clinics/vlsc_giammarco_complaint.pdf/. See also Decl. of Sharon Giammarco (on file with counsel); *U.S. Army Veteran Returns Home After YLS Clinics Secure Settlement* (Jul. 27, 2017), <https://law.yale.edu/yls-today/news/us-army-veteran-returns-home-after-yls-clinics-secure-settlement>.

But he overcame addiction, found employment, married his partner Sharon, and focused his life on raising their little girl.

In 2011, seven years after Mr. Giammarco's last conviction, federal immigration agents came to his home, ordered him to lie face down on the ground, handcuffed him and took him away from his family. Held without access to a bond hearing, Mr. Giammarco watched helplessly as his family liquidated their savings fighting his case. He suffered daily indignities in jail, the worst of which was being physically separated from his family by plexiglass during visitation. Unable to hold his two-year-old daughter, Mr. Giammarco agreed to his own deportation. Recalling the experience, Mr. Giammarco said:

It was a complete nightmare. The hardest part was being away from my wife and daughter, who was two years old at the time. Watching my daughter behind a pane of glass, I still remember her crying that she wanted me to hold her, she wanted me to play with her like I used to. But I couldn't.

In 2017, a federal court recognized that Mr. Giammarco's citizenship application had been valid, and he was finally able to return home to the United States as a U.S. citizen. In the end, his mandatory immigration detention had served no purpose other than to punish Mr. Giammarco and his American family.

The family of **Nhan Phung Vu**⁴¹ also experienced grave harms. A lawful permanent resident from Vietnam who has lived in the United States since he was

⁴¹ The facts of Mr. Vu's case are detailed in the filings in *Gordon, et al. v. Nielsen, et al.*, No. 13-cv-30125 (PBS) (D. Mass.).

just four years old, Mr. Vu was arrested and jailed by immigration agents in Franklin County House of Corrections in Massachusetts. During his imprisonment, his wife and children lost their health coverage, which had been provided by Mr. Vu's employer. His stepson, who was suffering from Hodgkin's lymphoma, stopped receiving vital follow-up treatments he needed to recover from cancer. His daughter was unable to attend physical therapy. Both of Mr. Vu's daughters were plagued by nightmares. And Mr. Vu's wife struggled to make mortgage payments without Mr. Vu's steady income. After Mr. Vu was released, he was able to return to his family—but his seven months of confinement had taken a serious toll.

Prolonged immigration imprisonment has reverberating effects regardless of the outcome of the immigration case. Imprisonment of a parent leads to trauma and behavioral changes in young children, dramatic loss of household income and increased risk of eviction, and child welfare involvement.⁴² These are preventable harms affecting hundreds of thousands of American families.

* * *

These examples—of solitary confinement, medical neglect, abuse, and forced labor—are predictable outcomes of system designed to punish. Prolonged

⁴² *U.S. Citizen Children Impacted by Immigration Enforcement*, AM. IMMIGR. COUNCIL (Nov. 22, 2019) <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement>.

immigration imprisonment is punishment, no less worthy of careful constitutional scrutiny at six months than any other context.

II. “Out in the Sea, Drowning”: Ad Hoc Habeas Litigation Is Often Impracticable, Fails to Ensure Due Process for Individuals Whose Detention Is Already Prolonged, and Does Not Address the Indeterminacy of Prolonged Detention.

When **Patrick Thaxter**, a lawful permanent resident and father to five U.S. citizen children, found counsel to file a habeas petition to challenge his prolonged immigration based on a marijuana conviction, he was elated.⁴³ Five hundred and thirty days later, the district court granted his petition and adopted the magistrate’s findings, including a recognition that Mr. Thaxter’s detention was prolonged at the date of his initial filing.

Allowing such harms to grow more severe while habeas litigation drags on for months and years serves only to compound injustice rather than address it. Besides traveling to his job, Mr. Thaxter rarely leaves the house; his years in immigration jail have accustomed him to confinement. As he describes it:

I felt sick. I didn’t know what to do. . . . Being in detention is like you are out in the sea, drowning and you don’t have anything to save you. It was the hardest thing I have experienced in my life.⁴⁴

⁴³ See Decl. of Daniel Conklin, Esq. (on file with counsel).

⁴⁴ *Three Years a Detainee*, IMM PRINT (Nov. 21, 2016) <https://imm-print.com/three-years-a-detainee-6ce1db674c41/>.

Habeas litigation became a life raft, but he never imagined he would have to hang on for so long. He often thought about giving up. Only the fear that his girls would think he abandoned them kept him here.

Mr. Thaxter is not alone. None of the harms described in the stories above were promptly mitigated by individual habeas litigation, for three reasons. First, for most, habeas litigation is impracticable. There is no recognized right to counsel in removal proceedings: the vast majority of detained immigrants appear pro se, navigating a system of laws “second only to the Internal Revenue Code in complexity.” *Castro-O’Ryan v. U.S. Dep’t of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (internal citation omitted). Federal litigation is time-consuming and complicated, especially for noncitizens who are incarcerated, often do not speak English, and are more likely than not unrepresented.⁴⁵ Eighty-six percent of immigrants in immigration jails and prisons navigate their immigration court cases pro se; to expect them to also file habeas litigation in federal court is unfair.⁴⁶

Second, even when an individual manages to file a habeas petition, relief is not prompt. Like in Mr. Thaxter’s case, individuals often languish for additional

⁴⁵ See Mary Holper, *The Great Writ’s Elusive Promise*, Crimmigration Blog, <http://crimmigration.com/2020/01/21/the-great-writs-elusive-promise> (January 21, 2020) (cataloging challenges posed by federal habeas requirement for incarcerated individuals and pro bono counsel).”

⁴⁶ Ryo, *supra*, at 1038-40.

months and years in detention while their petitions are adjudicated. A 2016 study of reported habeas petitions challenging mandatory detention within the First Circuit calculated that decisions ordering a bond hearing pursuant to a habeas petition took 237 days on average—more than seven months.⁴⁷ A 2017 study of habeas filings in the District of Massachusetts found that 28% mooted out before the petitions could even be adjudicated, either because the person was deported or won the deportation case.⁴⁸ It is unjust to require detainees to endure additional months or years in detention to vindicate claims, when confinement has already grown unconstitutionally prolonged at the time of filing.

Finally, prolonged immigration imprisonment’s indeterminacy exacerbates its punitive effects; habeas litigation, with its similar tendency to drag on for months and years, does not ameliorate this problem. In *Demore*, the Supreme Court based its decision in part on the assumption that detention prior to a removal order has a “definite termination point”: the entry of a removal order. *Demore*, 538 U.S. at 529; *cf. Zadvydas v. Davis*, 533 U.S. at 690. But while the possibility of a removal order provides a theoretical termination point, it does not make the term of prolonged mandatory detention any more “definite.” The actual length of detention often

⁴⁷ See Br. of Americans for Immigrant Justice et al., *Jennings v. Rodriguez*, No.15-1204, at 31 (S.Ct. filed Oct. 24, 2016).

⁴⁸ See Br. of Amici American Immigration Lawyers Association, Addendum, *Maldonado-Velasquez v. Moniz*, No. 17-1918 (1st Cir. filed Nov. 28, 2017).

depends on factors over which immigrants have no control. As Mr. Thaxter’s case demonstrates, such indefinite terms of incarceration inflict real physical and psychological harms on individuals and their families both during prolonged detention and after release. And as seen in the case of Mr. Giammarco, discussed above, this indeterminacy can lead people to accept a removal order rather than endure the uncertainty of indefinite imprisonment. Indeterminacy is the reason, according to surveys of immigrants subjected to six months or more of detention, why so many feel “hopeless” and under pressure to give up their meritorious cases.⁴⁹

Relying on habeas litigation to address these concerns offers too little hope to those worn down by six months of immigration imprisonment. Consider **Brayan Fernandez**, a lawful permanent resident whose mandatory detention separated him from his wife, who was pregnant at the time, and his two young U.S. citizen children.⁵⁰ Even though he qualified for a family-based visa that would have allowed him to remain in the United States, the visa petition sat dormant for months after submission and his lawyer explained that a habeas petition would also take time to adjudicate. After seven months of his mandatory detention without access to a bond hearing, Mr. Fernandez had missed the birth of his youngest son and had grown

⁴⁹ Ryo, *supra*, at 1029-31.

⁵⁰ “Brayan Fernandez” is a pseudonym to protect his family’s privacy. The facts of Mr. Fernandez’s case are detailed in a declaration by his attorney. *See* Decl. of Paige Austin, Esq. of the Bronx Defenders (on file with counsel).

increasingly disheartened and depressed. He accepted a deportation order rather than remain detained. At the hearing, his wife ran from the courtroom in tears. His I-130 petition was approved one month later. Today, his U.S. citizen wife and three children live in permanent separation from their husband and father.

The story of Mr. Fernandez illustrates how mandatory detention imposes unconstitutional deprivations of liberty well before the one-year mark. The unconstitutional, coercive conditions of Mr. Fernandez's detention led him to accept a deportation order after seven months—five months before the District Court would consider his detention presumptively unreasonable. Even if Mr. Fernandez had managed to file a habeas petition, he most likely would have still been waiting for a district court to schedule briefing, let alone reach the merits of his claims.

If due process means anything, it is a guaranteed substantive and procedural check on the Government's ability to incarcerate an individual. People must be guaranteed such protections—through a hearing at six months—rather than being coerced by the harsh conditions of confinement into giving up not only their legal cases but also their families and lives in the United States.

CONCLUSION

These stories of *Amici's* clients and community members demonstrate the human consequences of prolonged immigration confinement. They languish in facilities functionally identical to prison. Their rights to due process should not turn

on their ability and means to seek habeas review, which presents its own uncertainty as to when and if adjudication will result in a meaningful hearing. The horrific circumstances faced by people in immigration jails and prisons demand, at minimum, the guarantee of an automatic hearing at six months.

Dated: February 19, 2020
New York, NY

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I hereby certify that the foregoing Brief of Amici Curiae is proportionately spaced, has a typeface of 14 points or more and, according to computerized count on Microsoft Word, contains 6,470 words.

Dated: February 19, 2020
New York, NY

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CERTIFICATE OF SERVICE

I, Alina Das, hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Appellate CM/ECF System on February 19, 2019.

I certify that I have served counsel for all participants in the case, and that for registered CM/ECF users, service will be accomplished by the Appellate CM/ECF System.

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